In the

[illegible] Court of the United States

[illegible] Term, [illegible]

[illegible] Kaleb, Donald [illegible], [illegible] L. [illegible], Francis J. Cooney, William Schid-[illegible], George W. [illegible], William F. [illegible], William Cobb, George A. [illegible] and Mel-[illegible] [illegible], *Appellants,*

vs.

[illegible] V. [illegible], Warden of the United States Penitentiary at Leavenworth, Kansas, *Respondent.*

Appeal from the District Court of the United States for the District of Kansas.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANTS.

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INDEX.

PAGE

CASE INDEX.

In the

Supreme Court of the United States

October Term, 1920.

ALEXANDER KAHN, DONALD FISHER, ROBERT L. LECOCQ, FRANCIS J. COONEY, WILLIAM SCHIEMAN, GEORGE W. JERUE, WILLIAM F. PETERS, WILLIAM COOK, GEORGE A. POLSON and MILLARD BOWERS, *Appellants*,

vs.

AUGUST V. ANDERSON, Warden of the United States Penitentiary at Leavenworth, Kansas, *Respondent*.

Appeal from the District Court of the United States for the District of Kansas.

No. 421.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANTS.

I. The General Nature of the Case.

This is an appeal (Rec. 16) from a decree by the United States Court for the Kansas District, dismissing a petition (Rec. 2-13) for a writ of

habeas corpus to obtain the release of petitioners from the custody of respondent, the Warden of the United States Penitentiary at Leavenworth, Kansas.

II. The Proceedings Below and the Appeal.

Respondent detains appellants in the penitentiary by virtue of certain judgments and sentences imposed by a general court-martial (Rec. 8-9-10) and by virtue of certain orders (Rec. 8-9-10) of the President of the United States, approving said sentences, and of the War Department publishing said orders (Rec. 6-10). The sentences and judgments were based upon a finding of guilty (Rec. 7-8) by said general court-martial, as to each appellant, of a charge of murder (Rec. 2-3) of one Shelby Hisle at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, on or about the 29th day of July, 1918 (Rec. 3). Appellants were charged by an army lieutenant, on August 31, 1918 (Rec. 2-3), with violation of the 96th Article of War (conspiracy to murder) and of the 92d Article of War (murder), and were tried on said charge before a court-martial from the 4th to the 25th days of November, 1918, inclusively, at Fort Leavenworth, Kansas (Rec. 5). Appellants objected to the jurisdiction of said court-martial on the ground that the court-martial was without jurisdiction to try any person by court-martial for murder committed in the geographical limits of the states of the Union in time of peace, and that it was a time of peace in the state and district of Kansas and

within the geographical limits of the United States on the 29th day of July, 1918. This was denied. On the 14th day of April, 1920, appellants filed their petition in the court below (Rec. 13). The respondent filed a motion to dismiss (Rec. 13-14) on the ground that the facts stated in the petition did not give the court jurisdiction to grant the writ as prayed; that the petition shows on its face that if the writ were granted the same would be discharged on the writ and appellants remanded to the custody of respondent, and that on the face of the petition the appellants had not completed the terms of imprisonment imposed by the judgment and sentence of the general court-martial and that they were not entitled to *habeas corpus*. This motion was sustained and a decree (Rec. 14) entered dismissing the cause. Thereupon, an appeal was allowed (Rec. 16) and the case brought here (Rec. 18). Upon appellants' motion presented at the convening of the court at this term, the cause was advanced and is now here for final determination.

III. Appellants' Contentions Are:

A. Congress is without power to enact a law drafting citizens into the Army and subjecting them to trial while the courts are open for a capital crime committed within the United States against the ordinary law of the land by a court-martial.

B. Clause 14 of Section 8, Article 1 of the Constitution, must be interpreted in connection with and the powers granted must be exercised subject to the provisions of the Constitution com-

manding that all crimes, except in cases of impeachment, shall be tried by jury and that in all criminal prosecutions the accused shall enjoy the right to a trial by jury and that no person shall be deprived of life or liberty without due process of law.

C. The provisions of the Constitution of the United States concerning jury trial refer to the right to trial by jury as it was enjoyed by Englishmen when serving as soldiers in England at Common Law, and as it was enjoyed by Americans serving their country during the war of the Revolution and all succeeding wars until the World War, that is, by juries of the peers of the accused according to the known laws of the land.

D. The provision of the Fifth Amendment permitting the accusation of persons in the land forces by methods other than by presentment or indictment by a grand jury, involves a matter of *procedure* rather than of *substantial right* or the application of original justice. That provision did not operate to deprive a citizen conscripted into the army of his right to trial by jury for a capital crime (after having been accused in any way that Congress might provide), such as a soldier or citizen was entitled to at Common Law or under and by virtue of the acts of the Continental Congress during the Revolutionary War.

E. The 92d Article of War prohibits the trial of every person, military or non-military, for the crime of murder committed within the geographical limits of the states of the Union and the District of Columbia in time of peace, that is at a time when the courts are open, and prohibited

the executive power from trying appellants by court-martial for the reason that on the 29th day of July, 1918, the courts were open in the state and district of Kansas and within the geographical limits of the states of the Union and the District of Columbia and it was therefore a time of peace within said limits.

F. The law recognizes a distinction between domestic and foreign wars, and the question as to whether or not a state or time of war existed insofar as personal rights are involved is to be determined by the records and judges of the courts of justice, and not by the records, officers or acts of any other department of the Government.

G. The Armistice between the Allied Powers and Germany of November 11, 1918, ended the war with Germany as a fact and also ended the power existence and jurisdiction of a tribunal which was called into being only by the actual existence of a state of actual war. The 92d Article of War in the nature of things must be transposed to read "no person shall be tried in time of peace by court-martial for murder, etc." As the trial did not end until two weeks after the war ended the sentence could not be promulgated by a maritime tribunal.

H. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to take away from them the jurisdiction which they had always exercised with respect to soldiers and citizens can be ascribed to Congress in the absence of clear and direct language to that effect. Hence, the prohibition in the

92d Article of War denying jurisdiction to courts-martial to try soldiers for murder committed in time of peace prevented the court-martial in question from trying appellants.

I. The order detailing the court-martial was not in accordance with the requirements of the 4th Article of War which requires that members of army courts-martial must be officers *in* the Military service or Marine Corps, and it appears from the detail and from the orders of the President of the United States, that the President of the court was not an officer *in the army*, but that he was an officer who had *retired from the army*, and this is true as to another member of the court, named Fales. Three other members were designated as United States guards and it does not appear whether the guards were military guards or coast guards or that they were officers in the army of the United States or the Marine Corps.

J. The detail of eight instead of thirteen members, in violation of the 5th Article of War, which expressly commands that the number of officers on general courts-martial shall not consist of less than thirteen (13), when that number can be convened without manifest injury to the service, and this, notwithstanding the fact that the records of the war show that there were hoards of army officers from whom the President could have selected thirteen without manifest injury to the service.

K. The necessity of maintaining discipline in the army does not authorize Congress, by virtue of its Constitutional power, to make rules for the government of the land forces or to enact laws

providing that citizens may be deprived of their right to jury trial when charged with a capital crime, even if the end sought to be accomplished by such law be legitimate, but no such assumed necessity exists.

L. Appellants were not in or members of the land or naval forces of the United States on July 29th, 1918, hence they could not be tried for a capital crime by a court-martial. The original sentences by which they became general prisoners discharged them from the army.

M. *The express recognition in the first Articles of War adopted by the Continental Congress of the right of a soldier charged with a capital crime, during time of war, to a trial by jury, and the executive, legislative and judicial recognition of that right during all the wars in which this country was engaged until 1863, was merely a recognition of the right in that respect enjoyed by soldiers at common law, and the rule that the provisions of the Constitution concerning the right to trial by jury will be interpreted with reference to the common law and previously existing legislation in connection with the rule that the practical interpretation of a law by all the departments of the Government for a long series of years demonstrates that the Constitution itself expressly preserves a soldier's right to be tried by a jury when charged with a capital crime, and that Congress under the guise of making rules for the government and regulation of the land forces can never take it away.*

Constitutional Provisions Involved:

Section 8, Article 1:

"The Congress shall have power
* * * * * * *
To raise and support armies
* * * * * * *
To make rules for the government and regulation of the land * * * forces
* * * * * * *
To make all laws which shall be necessary and proper for carrying into effect the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department thereof."

Clause 3 of Section 2 of Article 3:

"The *trial* of *all* crimes, *except in cases of impeachment*, shall be by *jury*, and such trial shall be held in the state where the said crime shall have been committed."

Article 5 of the Amendments:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger* * * * nor be deprived of life, liberty or property without due process of law * * *"

Article 6 of the Amendments:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or dis-

trict wherein the crime shall have been committed * * *"

Article 9 of the Amendments:

"The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article 10 of the Amendments:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states are reserved to the states respectively or to the people."

Acts of Congress and Articles of War Involved:

"Section 1342. The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States."

"Article 2. *Persons subject to military law.*—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law', or 'persons subject to military law', whenever used in these articles."

"(d) All persons under sentence adjudged by courts-martial;"

"Article 4. *Who may serve on courts-martial.*—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial."

"Article 5. *General Courts-Martial.*—General courts-martial may consist of any number of officers from five to thirteen, inclusive; but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."

"Article 12. *General Courts-Martial.*—General courts-martial shall have power to try any person subject to military law for any crime or offence made punishable by these articles and any other person who by the law of war is subject to trial by military tribunals."

"Article 92. *Murder—Rape*—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but *no person* shall be tried by court-martial for murder or rape committed within the geographical limits of the State of the Union and the District of Columbia *in time of peace.*"

ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 14-15) are that the court below erred in:

(1) Decreeing a dismissal of the petition

(2) Holding that the general court-martial had jurisdiction to try petitioners on a charge of murder.

(3) Holding to be valid and constitutional the 92d Article of War, and that it authorized a general court-martial at a time and place when the courts were open to try your petitioners on a charge of murder.

(4) Denying to appellants the benefit of Section 2, of Article 3, of the Constitution of the United States providing that the trial of all crimes except in cases of impeachment shall be by jury.

(5) Permitting respondent to deprive appellants of their liberty under sentence rendered in violation of the rights of the petitioners under the 5th Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law.

(6) Holding that the executive power of the United States at a time when the courts were open could usurp judicial functions and exercise that judicial power which was exclusively vested in the courts by Section 1 and 2 of Article 3, of the Constitution of the United States.

(7) Holding that a tribunal composed of retired officers of the army and of United States

Guards, were officers of the army of the United States and that they possessed the qualifications required by the laws of the United States, for members of a general court-martial.

(8) Holding that a tribunal consisting of eight members could try the petitioners for their lives in violation of the provisions of the Fifth Article of War, requiring that general courts-martial shall not consist of less than thirteen (13) members.

(9) Holding that petitioners were not entitled to the protection of the Sixth Article of Amendment to the Constitution of the United States, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed and that a court-martial had jurisdiction without the aid of a jury to try petitioners, for the crime of murder, at a time and place where the courts were open and during a time and place where peace existed within the meaning of the law.

BRIEF AND ARGUMENT.

I.

Notwithstanding Congress by express constitutional provision has the power to prescribe rules for the government and regulation of the army, those rules must be interpreted in connection with the provision that the trial of all crimes except in cases of impeachment shall be by jury and that in all criminal prosecutions the accused shall enjoy the right to a trial by jury and that no person shall be deprived of life or liberty without due process of law. The former provision must not be interpreted so as to nullify the latter provisions.

Section 2 of Article III, specifically providing that

> "The *trial* of *all crimes, except in cases of impeachment*, shall be by jury,"

contains a limitation upon the power of Congress or the executive to subject any person whatsoever to trial on a *capital criminal* charge *except in the cases included in the exception*, to-wit, *cases of impeachment*. The Sixth Amendment, using the impersonal and all embracing words, "In *all criminal* prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," is a command to the Government and a limitation upon its power prohibiting it from subjecting any person to any species or variety of trial in a criminal prosecution except by jury, and the same result follows from the prohibition of the Fifth

Amendment forbidding deprivation of life or liberty without due process of law.

The Fifth Amendment makes a "presentment or indictment of a grand jury" a condition precedent to the right of the Government to *hold* any person "to *answer* for a capital or otherwise infamous crime" except in cases arising in the land or naval forces, or in the militia, "when in actual service in time of war or public danger."

Manifestly the Fifth Amendment does not modify the provisions of Sec. 2 of Art. III, commanding that "the *trial* of *all* crimes * * * shall be by jury," or of the Sixth Amendment, commanding that "In *all criminal prosecutions* the accused shall enjoy the right to a speedy and public *trial* by an impartial jury," or of the Fifth Amendment commanding that "No person * * * shall be deprived of life, liberty or property without due process of law."

The third Article and the Sixth Amendment provides for the method or mode *of trial* of an *accused*. The Fifth Amendment points out the way in which a person *shall be accused* except in certain cases. That is to say, the Fifth Amendment does not point out the way in which a person shall be *accused* in cases arising in the land forces. It then becomes pertinent to inquire how does the Constitution provide for the *accusation* in such cases and whether or not the Constitution provides for the mode of trial to be followed in such cases.

Section 8 of Article I provides that "The Congress shall have power:

> "To raise and support armies * * *;
> To provide and maintain a navy;
> To make rules for the government and regulation of the land and naval forces.
> * * * * * * *
> To make all laws which shall be *necessary* and *proper* for carrying into execution the foregoing powers."

The Fifth Amendment excepts cases arising in the land forces from the rule governing the *method of accusation* (indictment), but contains no exception concerning *the right of trial by jury*. We think that the maxim, *"Expressio unius est exclusio alterius,"* is applicable here. The express exception of cases of impeachment from the constitutional provision that the *trial* of all crimes shall be by jury and the express exception of cases arising in the land forces from the rule requiring an *indictment* or *presentment* by a grand jury before any person shall be held to answer for a capital or otherwise infamous crime, bring the cases of persons in the land forces within the command of the constitution that the *mode of trial* for crimes against society shall be the same for all persons, soldiers and citizens. In 12 C. J. 707 it is said:

> "Under the maxim, *Expressio unius est exclusio alterius*, the enumeration of certain specified things in a constitutional provision will usually be construed to exclude all things not thus enumerated."

The enactment of a law authorizing a court-martial to try a soldier for a civil crime when the courts are functioning can hardly be a rule which is necessary and proper for the regulation or government of the land forces. A person who commits a crime against society and thereby violates a law to which society attaches a penal sanction should be tried in the ordinary courts established by that society for its preservation. The powers above enumerated must be construed so as not to nullify the provisions of the Constitution which guarantee fundamental rights to the citizen whether he be arrayed in the garb of a soldier or a civilian. The courts from the time of the formation of the nation on the few occasions when the members of the standing army or the navy sought relief on *habeas corpus* from court-martial proceedings denied same on the theory that the petitioners were guilty of infractions of *military rules* and regulations and that trial and punishment for such infractions before courts-martial did not prevent their prosecution for the same crime before the courts of the United States. This rule was followed until the decision in *Grafton* v. *United States*, 206 U. S. 333, established the principle that a soldier is entitled to invoke the constitutional guaranties. There the Supreme Court held that the provision of the Fifth Amendment that no person could be twice put in jeopardy of life or limb applied to a soldier acquitted by a court-martial Said the court:

> "Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the army,

but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be interpreted so as to nullify the latter."

If the constitutional provision giving Congress the power to make rules for the government and regulation of the *army must not be interpreted so as to nullify the jeopardy clause of the Fifth Amendment*, it follows that persons in the land and naval forces may still invoke the protection of every other clause and of every other amendment. An interpretation of the provision giving the Congress the power to make rules which nullifies the right of a soldier when charged with a crime against the United States *to a trial by jury within the geographical limits of the United States* where the courts are open is not a permissible interpretation under the decision in the Grafton case. If he has a right to invoke that clause of the Fifth Amendment providing that "nor shall any person for the same offense be twice put in jeopardy of life or limb," it is difficult to understand how he happens to be prohibited from invoking the provisions of the Sixth Amendment expressly granting to the accused "in all criminal prosecutions" the right to a public trial by jury or to invoke the provisions of Section 2 of Article III of the Constitution providing that the trial of "all crimes * * * shall be by jury" excepting only in cases of impeachment, or to invoke that clause of the Fifth Amendment guaranteeing due process of law. In the Grafton case this court expressly holds that a

prosecution for homicide before a court-martial is a "criminal prosecution" and that it so operates upon the "civil offense" as to prevent a prosecution therefor in a civil court of the same Government. If a soldier can successfully invoke one provision, why not every other?

The claim that the Grafton decision determined that the trial of Grafton without a jury was legal and therefore that the question as to whether or not a soldier could claim the protection of the constitutional guaranties was directly presented and decided in that case adversely to our contention, is without merit when we reflect that Grafton was tried for a non-capital offense in the Philippines, beyond the geographical limits of the States of the Union, and that no person, soldier or civilian, can successfully claim the right to a jury trial in the Philippines (*Dorr* v. *United States*, 195 U. S. 138). Furthermore, Grafton did not invoke the right to a jury trial and it was conceded by the Government and by Grafton, as we also concede, that Congress has power to create any sort, kind or variety of tribunal for the trial of persons charged with crime beyond the geographical limits of the United States in cases where Congress has not enacted a law extending the Constitution of the United States to the territory in which the accused is being tried (*Dorr* v. *U. S., supra;* Ross Case, 140 U. S. 453).

Art. I, Sec. 8, Clause 14, and Art. III, Sec. 2, Clause 3, were the only provisions in the Constitution before the adoption of the first ten amend-

ments applicable to the question under consideration. Those provisions read:

> "The Congress shall have power: * * * To make rules for the government and regulation of the land * * * forces." (Art. I, Sec. 8, Cl. 14.)

> "The trial of all crimes, except in cases of impeachment, shall be by jury." (Art. III, Sec. 2, Clause 3.)

The power to make rules for the government and regulation of the land forces did not operate to constitute an additional exception to the all-embracing command of Art. III, Sec. 2, Clause 3. According to the contention of the Government that clause must read, "The trial of all crimes, except in cases of impeachment, *and except in cases arising in the land forces,* shall be by jury." But if it be permissible to write one exception into said clause merely because Congress is given power to make rules for the government and regulation of the land forces, then by the same mode of reasoning it would also be permissible to write another exception based on Clause 2 of Sec 3 of Art. IV, giving Congress power to make all needful rules and regulations respecting the territory of the United States. It would likewise be permissible to write an exception based on Clause 6 of Sec. 8 of Art. I, giving Congress power to provide for the punishment of counterfeiting the securities and current coin of the United States, or Clause 10, giving Congress power to define and punish piracies and felonies committed on the high seas,

and offenses against the law of nation, and so on *ad infinitum* until the clause would read:

> "The trial of all crimes, except in cases of impeachment (and except in cases in the land and naval forces, and except in cases where crimes are committed in a territory of the United States, and except in cases where the securities and coin of the United States are counterfeited, and except in cases where piracies and felonies are committed on the high seas, and except in cases where offenses are committed against the law of nations, etc.), shall be by jury."

It would be no more absurd to write the last additional exception than the first into the clause in question. But if any were written in, what becomes of the violation of the ordinary rules of grammatical construction? What becomes of the rule that an express exception from a law is an affirmation of the application of the law to all cases not excepted? What becomes of the rule that all cases not within an exception are excluded from its operation?

The exception in the Fifth Amendment concerning the mode in which the *accusation* of persons in the land forces might be formulated before putting such persons on *trial* for capital or infamous crimes was a recognition by the people that without such amendment the soldier could be accused only in the same manner as the non-military citizen.

Until the decision in the Grafton case, it was held by the Supreme Court in the few instances in which the question reached it that soldiers could not claim a citizen's right under the Constitution.

(See note to *Grafton* v. *U. S.*, 11 A. & E., Ann. Cas. 640, where the editor cites authorities announcing the old rule.)

We know of but one other case in which the question here involved has been passed upon by a Federal court. In *Ex Parte Henderson*, 11 Fed. Cas., No. 6349, the court said:

> "The Constitution of the United States in the Third Subdivision of Section 2, Art. 3, provides that 'the trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed, but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.' The difficulty is in finding, in spite of this provision, *any authority in Congress to provide for the trial of even persons in the army or navy, or in the militia, for crime, otherwise than by jury.* * * *"

The fact that in July, 1918, this country was engaged in a war with Germany did not operate to deprive the appellants of the protection of not claim a citizen's right under the Constitution. This and other courts have held that the war powers of Congress both in time of peace and war, must be exercised subject to the due process clause of the Fifth Amendment.

In *Hamilton* v. *Kentucky Distillery & Warehouse Co.*, 40 S. C. 106, on November 20, last, the court said:

> "The exercise of the war powers is (except in respect to property destroyed by military

operations, *U. S.* v. *Pac. R. R. Co.*, 120 U. S. 227) subject to the Fifth Amendment."

Chief Justice Taney in *U. S.* v. *Carpenter*, Vol. 2, Davis' Rise and Fall of the Confederate Government, page 348, said:

> "A Civil War, or any other, does not enlarge the powers of the Federal Government over the state or the people beyond what the compact has given to it in time of peace. A state of war does not annul the tenth article of the Amendments to the Constitution, which declares that 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people, *nor does a civil war, or any other war, absolve the judicial department from the duty of maintaining with an even and firm hand the rights and powers of the Federal Government and of the states, and of the citizens, as they are written in the Constitution, which every judge is sworn to support.*"

In *ex parte Milligan*, 4 Wallace, the court said:

> "The Constitution of the United States is the law for rulers and people *equally, in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.* No doctrine involving more pernicious consequences, was ever invented than that any of its provisions can be superseded during any of the great exigencies of the Government. Such a doctrine leads directly to anarchy or despotism. But the theory of necessity on which it is based is false. For the Government, within

the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been proven."

We think the principle applied in the Grafton & Henderson cases controls the case. That principle could not be applied unless the soldier was entitled to invoke the protection of the Bill of Rights. We propose to demonstrate under the next point discussed that the exception in the Fifth Amendment concerning the mode of *accusation* in cases arising in the land and naval forces was an exception concerning a mere matter of *procedure*, and that it left the soldier, concerning his *substantial rights*, with reference to the mode of *trial* for capital crimes, in exactly the same situation as he was at common law and as the ordinary citizen is today.

II.

The provisions of the Constitution of the United States concerning jury trial refer to the right to trial by jury as it was enjoyed by Englishmen in England at common law. The common law knew no distinction between citizen and soldier. The provision of the Fifth Amendment permitting the accusation of persons in the land and naval forces by methods other than by presentment or indictment of a grand jury involves a matter of procedure rather than of substantial right. That provision did not operate to deprive a citizen conscripted into the army of his right to a trial by a jury (after having been accused) such

as a soldier or citizen was entitled to at common law.

To determine whether or not a conscript soldier has lost his rights under the Constitution at the instance of the government in accordance with the provisions of "the law of the land" when he has been tried by a court-martial and put to death pursuant to its sentence, it is necessary to examine and determine what the rights of a soldier were at common law and during the period between the time the Revolution began and the adoption of the Constitution. This for the reason that the "law of the land" which applied to such person at common law and during the revolutionary period must be held to be the variety of law which he is entitled to invoke under the Constitution. The first and leading case in which the clause of the Fifth Amendment forbidding the Government from depriving any person of property, liberty or life "without due process of law," or the "law of the land," was construed by the Supreme Court in *Murray's Lessee et al* v. *Hoboken Land and Improvement Co.*, 18 How. 272, l. c. 276. It is there said:

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on these words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the

words, 'but by judgment of his peers, or the law of the land.'

* * * * * *

The constitution of the United States, as adopted, contained the provision that 'the trial of all crimes except in case of impeachment, shall be by jury'; when the Fifth Article of Amendment was made, the trial by jury had already been provided for. But the Sixth and Seventh Articles of Amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the State Constitutions and in the Ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause 'law of the land' without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator and Magna Charta had declared to be the true meaning of the phrase, 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning.

* * * * * *

To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, *we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to*

their civil and political condition by having been acted on by them after the settlement of this country."

In *U. S.* v. *Reid*, 12 How. 360, l. c. 363, it is said:

"The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony. And among the most cherished and familiar principles of the common law was the trial by jury in civil, and still more especially in criminal cases."

In *Murray* v. *Ry.*, 62 Fed. l. c. 27, it is said:

"When the Constitution of the United States was adopted it was based upon the general principles of the common law, and its correct interpretation requires that the general provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate the existence of the common law in the Colonies. It came originally into the several Colonies, not by force of legislative enactment to that effect by the Parliament of Great Britain, and the effect of which might be held to have terminated when the Colonies became independent, but, as is said by Mr. Justice Story, speaking for the Supreme Court in *Van Ness* v. *Pacard*, 2 Pet. 137-144: 'Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that

portion which was applicable to their condition."

In *Chisholm* v. *Georgia*, 2 Dall. 419, l. c. 435, the court said:

> "The only principles of law, then, that can be regarded are those common to all the states. I know of none such which can affect this case, but those which are derived from what is properly termed 'the common law,' a law which, I presume, is the groundwork of the laws in every state in the Union and which I consider, so far as applicable to the peculiar circumstances of this country, and where no special act of the legislature controls it, to be in force in each state *as it existed in England* (*unaltered by any statute*) *at the time of the first settlement of the country.*"
>
> (Italics by the court.)

In *Twining* v. *New Jersey*, 211 U. S. 78, l. c. 100, 102, it is said:

> "What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England *before the emigration* of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. * * *
>
> * * * * * *
>
> *No change in ancient procedure can be made which disregards those fundamental principles,* to be ascertained from time to

> time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

It then becomes pertinent to inquire to what extent the common law right of trial by jury was adopted in this country within the meaning of the Constitution. In *Callan* v. *Wilson*, 127 U. S. 540, l. c. 549, it is said:

> "The Third Article of the Constitution provides for a jury in the trial of 'all crimes, except in cases of impeachment.' The word 'crime,' in its more extended sense, comprehends every violation of public laws; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, *at common law, determine whether the accused, in a given class of cases, was entitled to be tried by a jury.*"

Holding that there was no conflict between the provision of the Third Article providing that "the trial of all crimes, except in cases of impeachment, shall be by jury," and the Sixth Amendment, the court said:

> "We do not think that the amendment was intended to supplant that part of the Third Article which relates to trial by jury. There is no necessary conflict between them. * * * As the guarantee of a trial by jury, in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in

> criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

In *Capital Traction Company* v. *Hof*, 174 U. S. 1, l. c. 6, it is said:

> "The first Continental Congress, in the Declaration of Rights adopted October 14, 1774, unanimously resolved that 'the respective colonies are entitled to the *common law of England*, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, *according to the course of that law.*"

On page 8 the court, holding that the people in adopting the Constitution did not adopt it with reference to the various methods in which the right was enjoyed in the colonies or in the states prior to the adoption of the Constitution, said that the people, in adopting the provisions of the Constitution with reference to jury trials,

> "had in view of the rules of the common law of England, *and not the rules of that law as modified by local statute or usage in any of the states.*"

In *Schick* v. *United States*, 195 U. S. 1, l. c. 69, it is said:

> "It must be read in the light of the common law, 'That,' said Mr. Justice Bradley, in *Moore* v. *United States*, 91 U. S. 270, 274, referring to the common law, 'is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law.' Again, in *Smith* v. *Alabama*, 124 U. S. 465, 478, is this declaration by Mr. Justice Matthews: 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' In *United States* v. *Wong Kim Ark*, 169 U. S. 649, 654, Mr. Justice Gray used this language: 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."

The reason for incorporating the common law guaranties in the sense understood in Coke's day with reference to jury trial in the Constitution was strengthened by the consideration that the judges under the Stuart Kings usurped the duty of the jury and decided not only the law but the *facts*. On the bloody circuit jurors were coerced to render verdicts contrary to both the law and the facts. (Vol. I, p. 506, Macaulay's History of England.) This departure from the ancient rule of the common law that "in questions of law

judges respond; in matters of fact, the jury" (Littleton's case, 10 Coke's Rep., p. 56, b) caused such detestation of this arbitrary conduct on the part of judges that after the revolution of 1688 the pendulum swung the other way, so that both in England and the Colonies for a long period jurors were held to be judges not only of the facts but of the *law also*. (See note said to be appended by the late Justice Gray to *Irving* v. *Craddock*, 1 Quincy's Reports [Mass.] 553, and his dissenting opinion in *Sparf and Hansen* v. *U. S.*, 156 U. S. 51, 715.) Misled by the then current notion, the Supreme Court of the United States in *Georgia* v. *Brailsford*, 3 Dall. 1, followed the post revolutionary custom and ruled that jurors were judges of the *law* and the facts. This ruling, however, overlooked the fact that the Continental Congress on October 14, 1774, declared that the Colonies were entitled to the common law of England and the great and inestimable privilege of being tried by their peers of the vicinage *according to the course of that law*. (*Traction Co.* v. *Hof*, 174 U. S. l. c. 6.) The later decisions of this court finally established the doctrine that the right to jury trial mentioned in the Constitution was the counterpart of the right enjoyed by Englishmen at the common law. (*Callan* v. *Wilson*, 127 U. S. 540, l. c. 549; *Traction Co.* v. *Hof*, 174 U. S. l. c. 6; *Schick* v. *U. S.*, 195 U. S. 65, l. c. 69.) That the judicial power mentioned in the Constitution extended to both civil and criminal cases and that in determining to what cases that power extended the court would assume that the Constitution was adopted with reference to the common law of

England as it stood in the fourth year of James I, the time of the first English settlement of the Colonies. (*Chisholm* v. *Georgia*, 2 Dall. 419, l. c. 435; *Tennessee* v. *Davis*, 100 U. S. 257.)

It thus appears that the right to trial by jury which the Constitution was intended to secure was the right which was applicable to all persons and cases at the common law in England from the time of the adoption of the Great Charter.

The next question is, did those inhabitants of England whom the King compelled to serve in his armies or who rendered military service to their country, when on trial for crime within the geographical limits of England, enjoy the right to a trial by jury? That they did is demonstrated by the following:

By the law of England at the time of the Norman Conquest the only penalty which could be imposed for a military offense was forfeiture of the land of the offending soldier. In Domesday Book and Beyond (Maitland, p. 295) it is said:

> "Such rules when regarded from one point of view may well be called feudal. Bookland having been derived from, is specially liable to return to the King. It will return to him if the holder be guilty of shirking his military duty or of other disgraceful crime."

This law empowered the King to declare the forfeiture. In course of time the Kings so abused this power that it was taken away by Magna Charta. From the time of the adoption of that Charter to the year 1689 the law of England made no distinction between the soldier and civilian

(See Petition of Right, 3 Car. 1, A. D. 1627; Mutiny Act, Stat. of Realm, Vol. 6, pp. 55-56; 1 Wm. & M. c. 5; Macaulay's History of England, Vol. III, p. 34; Vol. 3, Campbell's Lives of the Chief Justices, 91; *Ex Parte Reed*, 100 U. S. 13. l. c. 21; Blackstone's Commentaries, Book 1, 413; 3 Inst., 52; Military Law and War-time Legislation [West Pub. Co. 1919], pages 1 to 5.)

The rule at common law in this regard is thus enunciated by Coke (Inst. III, p. 52):

> "If a lieutenant, or other that hath commiffion of marfhall authority, in time of peace hang, or otherwife execute any man by colour of marfhall law, this is murder, for this is againft Magna Charta cap. 29, and is done with fuch power and ftrength, as the party cannot defend himfelf; and here the law implieth malice. *Vide Pafch.* 14 E. 3. in Scaccario the abbot of Ramfeys cafe in a writ of error in part abridged by Fitzh. tit. Scire fac. 122. for time of peace.
>
> Thom. countee de Lancafter being taken in an open infurrection, was by judgement of marfhall law put to death, in anno 14 E. 4. This was adjudged to be unlawfull, *eo quod non fuit arrainiatus, rainiatur, feu ad refponfionem pofitus tempore pacis, eo quod cancellaria, et aliae curiae regis, fuerunt tunc apertae, in quibus lex fiebat unicuique, prout fieri confuevit, quod contra cartam de libertatibus cum dictus Thomas fuit unus pariun et magnatum regni non imprifonetur, etc. Nec dictus rex fuper eum ibit, nec fuper eum mitter, nifi per legale judicium pariun fuorum, etc. tamen tempore pacis abfque arraniamento, feu responfione, feu legali judicio pariun fuorum, etc. adjuaicatus eft morti.*"

The Chapter of Magna Charta which Coke said would be violated by such an act is as follows:

> "No freeman ſhall be taken, or impriſoned, or be diſſeiſed of his freehold, or liberties, or free cuſtoms, or be outlawed, or exiled, or any otherwiſe deſtroyed; nor will we not paſs upon him nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will ſell to no man, we will not deny or defer to any man either juſtice of right."

In his commentary on this chapter (Inst. II, p. 46) Coke says:

> "No man ſhall be in any ſort deſtroyed (*deſtruere, i. quod prius ſtructum, et factum fuit, penitus evertere et diruere*) unleſſe it be by the verdict of his equals, or according to the law of the land.
>
> No man ſhall be condemned at the kings ſuite, either before the king in his bench, where the pleas are *coram rege* (and ſo are the words, *necſuper eum ibimus*, to be underſtood), nor before any other commiſſioner, or judge whatſoever, and ſo are the words, *nec ſuper eum mittemus*, to be underſtood, but by the judgement of his peers, that is, equalls, or according to the law of the land."

(Inst. II, p. 48):

> "No man deſtroyed, &c.
>
> That is, fore-judged or life, or limbs, diſherited, or put to torture, or death.
>
> The Mirror writing of the auncient laws of England, ſaith, *ſoloient les roys faire droit a touts, per eux, ou per lour chiefe juſtices.*

et ore les faits les royes per lour juſtices com-iſſaires errants aſſignes a touts pleas: en aid de tiels eires ſont tornes de viſcounts neceſ-faries, et viewes de frankpl. et quant que bones gents a tiels inqueſts inditerent de peche mor-tel, ſoloient les royes deſtruere ſans reſpons, &c. Accord eſt, que nul appelee, ne enditee ſoit deſtroy ſans reſpons. Thomas earle of Lancaſter was deſtroyed, that is, adjudged to die, as a traitor, and put to death in 14 E. 2. and a record thereof made: and Henry earle of Lancaſter his brother, and heire, was reſtored for two principall errors in the proceeding againſt the ſaid Thomas Earle, L. *Quod non fuit araniatus, et ad reſponſionem poſitus tempore pacis, eo quod cancellaria, et aliae curiae regis fuer' apertae, in quibus lex fiebat unicuique, prout fieri conſuevit. 2. Quod contra cartam de libertatibus, cum dictus Thomas fuit unus pariun, et magnatum regni, in qua continetur* (and reciteth this chapter of Magna Charta, and ſpecially, *quod dominus rex non ſuper eum ibit, nec mittet, niſi per legale judicium pariun ſuorum tamen per recordum praedictum, tempore pacis abſq; aranamento, ſeu reſponſione, ſeu legali judicio pariun ſuorum, contra legem, contra tenorem Magnae Chartae*) he was put to death; more examples of this kinde might be ſhewed."

Magna Charta did not abrogate the maritime law or law of the sea by virtue of which discipline has been maintained from time immemorial over the men who go down to the sea in ships. That is to say, the Great Charter required that the trial of all crimes committed within the geographical limits of England should be by the "law of the land." This did not disturb the ancient jurisdiction

of the maritime courts to try such offenses by the "law of the sea." (Vol. III, Coke on Littleton (Thomas's Ed.), pp. 335, 336; Blackstone's Com., Book I, pp. 418-421, Book III, 106-109; Broadfoot's Case, Foster's Rep. 154; *Le Caun* v. *Eden*, Doug. 572.)

In Vol. 3, Coke 1st Int. (Thomas Edition), pp. 335, 336, it is said:

> "* * * *altum mare* is out of the jurisdiction of the common law, and within the jurisdiction of the lord admiral, whose jurisdiction is very ancient, and long before the reign of Edward the Third, as some have supposed, as may appear by the laws of Oleron (so-called, for that they were made by King Richard the First, when he was there), that there had been an admiral time out of mind, and by many other ancient records in the reigns of Henry the Third, Edward the First, and Edward the Second is most manifest.
>
> This great officer in the Saxon language is called *Aen mere al*, (i. e.) over all the sea, *praefectis marjs, sive classis archithalassas;* and in ancient time the office of the *admiralty* was called *custodia Marinae Anglae*, or *Maritimae Anglae*."

In Vol. VII, Ency. Britt., p. 348, it is shown that a different rule applied to those men from that applicable to men in the army. It is there said:

> "The administration of the barbarous naval law of England was long entrusted to the discretion of commanders acting under instructions from the lord high admiral, who was supreme over the royal and merchant navy. It was the leaders of the Long Parliament

> who first secured something like a regular tribunal by passing in 645 an ordinance and articles concerning martial law for the government of the navy. Under this ordinance Blake, Monk and Penn issued instructions for holding general and ship courts-martial with written records, the one for captains and commanders, the other for subordinate officers and men. Of the latter, the mate, gunner and boatswain were members, but the admirals reserved a control over the more serious sentences."

See also Blackstone's Com., Book 1, pp. 418, 421.

There is no provision in the Constitution of the United States prohibiting the Government from conscripting the citizens and hence it was held in *Arver v. U. S.*, 245 U. S. 366, that they could be conscripted for foreign service. But the right to try them when conscripted as soldiers within the geographical limits of the United States in any other way than by a jury for crime committed against the United States is expressly prohibited by the Constitution. The right of a soldier in this respect at common law is shown by the following (Vol. 3, Macaulay's History of England, pp. 30 to 34):

> "The common law gave the sovereign no power to control his troops. * * * Even James did not venture to inflict death by sentence of a court-martial. The deserter was treated as an ordinary felon; was tried at the assizes by a petty jury on a bill found by a grand jury, and was at liberty to avail himself of any technical flaw which might be discovered in the indictment."

In the Petition of Right assented to by Charles I, in 1627, it is said:

> "Whereas also by authority of Parliament in the five and twentieth year of the reign of King Edward III, it is declared and enacted that no man should be fore-judged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this, your realm, either by the customs of the same realm, or by acts of Parliament; and whereas no offender of what kind soever is exempted from the proceeding to be used, and punishments to be inflicted by the laws and statutes of this, your realm; nevertheless of late times divers commissions under your majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against *such soldiers* * * * as should commit any murder, robbery, felony, mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law, and as used in armies in time of war, to proceed to the trial and condemnation of such offender, and then to cause to be executed and put to death according to the law martial:
>
> By pretext whereof some of your majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved it, by the same law and statutes also they might, and by no other ought to have been judged and executed: And also sundry

grievous offenders by color thereof claiming exemption, have escaped the punishments due to them by the laws and statutes of this, your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborn to proceed against such offenders according to the same laws and statutes, upon pretense that the said offenders were punishable only by martial law, and by authority of such commissions aforesaid; which commission and all other of like nature are wholly and directly contrary to the said laws and statutes of this, your realm."

In the first English Mutiny Act, which became a law in the year 1689, 82 years after the first settlement at Jamestown, it is said:

"Whereas, the raising or keeping of a Standing Army within this Kingdome in time of Peace unless it be with Consent of Parlyament is against Law. And whereas it is judged necessary by Their Majestys and this present Parliament That during the time of Danger several of the Forces which are now on foot should be continued and others raised for the safety of the Kingdome for the Common Defense of the Protestant Religion and for the reducing of Ireland.

And whereas *no man may be forejudged of life or limb or subjected to any kind of punishment by martial law or in any other manner than by the judgment of his peers and according to the known and established laws of this realm.* Yet nevertheless, it being requisite for retaining such forces as are or shall be raised during the exigence of affairs in their duty and exact discipline be observed. And that soldiers who shall *mutiny* or stir up

sedition or shall *desert* their majestys service be brought to a more exemplary and speedy punishment than the usual forms of law will allow."

* * * * * * *

"Provided always that nothing in this Act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law.

Provided always that this act or anything therein contained shall not extend or be any ways construed to extend to or concern any the militia forces of this Kingdome."

It thus appears that the Petition of Right and the Mutiny Act constituted a solemn recognition by the King, Lords and Commons that at common law no man could be deprived of his life or liberty for a crime or offense committed against the state unless he was tried by his peers in an ordinary court of law. Blackstone finds much occasion for regret in the Mutiny Act. He complains that it was the introduction of an alien principle into the English system of laws. (Book I, pp. 406 to 416.) He says: "The laws therefore and constitution of these kingdoms know no such state as that of a perpetual standing soldier bred up to no other profession." (Book I, p. 84.) He laments the fact that the Mutiny Act introduced a system of slavery into England, thus (Book I, p. 416):

"How much therefore is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! For Sir Edward Coke will inform us (e) that it is one of the

genuine marks of servitude to have the law, which is our rule of action, either concealed or precarious: '*misera est servitus ubi jus est vagum aut incognitum.*' Nor is this state of *servitude* quite consistent with the maxims of sound policy observed by other free nations. For the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Baron Montesquieu observes, (f) seeing the liberty which others possess, and which they themselves are excluded from, are apt (*like eunuchs in the eastern seraglios*) to live in a state of perpetual envy and hatred towards the rest of the community, and indulge a malignant pleasure in contributing to destroy those privileges to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of their slaves; while in absolute and despotic governments, where no real liberty exists and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are, therefore, to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all; or, 2, if it be already introduced, not to entrust those slaves with arms, who will then find themselves an overmatch for the freemen. *Much less ought the soldiery to be an exception to the people in general, and the only state of servitude in the nation.*"

The majority of those who adopted the Constitution were members of the Continental Congress. Of the fifty-six members of the Constitutional

Convention, thirty-nine had appended their signatures to that Declaration; one had heard Blackstone inveigh in his Oxford lectures against that Mutiny Act which reduced that "set of men whose bravery had so often preserved the liberties of their country * * * to a state of servitude in the midst of a nation of freemen" (I Bla., p. 416); four had read those lectures while studying at the Inner Temple; twenty-six others were lawyers who had studied Blackstone in this country; seven had signed that Declaration of Independence which justified their rebellion against the existing government in the opinion of mankind, because of the introduction of "standing armies," the making "the military independent of the civil power," "quartering troops" and "protecting them by mock trials" for murders; ten had served as state judges, of whom four were still upon the bench; one had been a judge of the old Federal Court of Appeals in cases of prize and capture; seven had served as judges in cases of disputed boundary lines between the states; eight had helped to frame the constitutions of their respective states; three had aided in the codification and revision of their own state laws; eight had been governors of states; five had been members of the Annapolis Convention; one had been a member of the Albany Convention; and three were universally regarded as oracles upon public or international law. All of them—whether lawyers or civilians—had witnessed the practical operation of our institutions as colonies under the crown and under the Articles of Confederation, and had enjoyed the best opportunities of observing the merits and defects of both systems. Such

were the men Edmund Burke described in his speech on Conciliation when he stated:

Six capital sources of what he called "a fierce spirit of liberty." First, "The people of the colonies" were "descendants of Englishmen." They were therefore "not only devoted to liberty, but to liberty according to English ideas, and on English principles." Second, "Their governments were popular in a high degree" in all "the popular representative is the most weighty." Third, "Religion, always a principle of energy, in this new people" was "in no way worn out or impaired. The Colonists left England when this spirit was high, and in the emigrants was the highest of all." Fourth, because even in the Slave States "freedom and privilege," those who were "free are by far the most proud and jealous of their freedom." Fifth, education. "In no country in the world is the law so general a study. * * * I learn," said he, "that they have sold nearly as many of Blackstone's Commentaries in America as in England. * * * They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze." Sixth, remoteness of situation. "Three thousand miles of ocean lies between you and them. No contrivance can prevent the effect of this distance in weakening your government. Seas roll, and months pass between the order and the execution."

The men who wrote the words, "The trial of all crimes, except in cases of impeachment, shall be by jury"; "No person * * * shall be deprived of life, liberty or property without due process of law," and "In all criminal prosecutions the accused

shall enjoy the right to a speedy and impartial trial by a jury," also wrote the Declaration of Rights of October 14, 1774, which proclaimed:

> "That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of English Constitution, and the several charters or compacts, have the following rights:
>
> * * * * * * *
>
> "That our ancestors, who first settled these colonies, *were at the time of their immigration from the mother country,* entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England. * * * That by such immigration they by no means forfeited, surrendered or lost any of those rights, but they were, *and their descendants now are,* entitled to the exercise and enjoyment of all such of them as their local and other circumstances enable them to exercise and enjoy.
>
> * * * * * * *
>
> *That the respective colonies are entitled to the common law of England and more especially to the great and estimable privilege of being tried by their peers of the vicinage according to the course of that law.*
>
> That they are entitled to the benefit of such of the English statutes as existed *at the time of their colonization,* and which they have by experience respectively found to be applicable to their several local and other circumstances.
>
> That these, his majesty's colonies, are likewise entitled to all the privileges and immunities granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."

They also wrote that section of the first Articles of War in 1775, which *expressly denied* jurisdiction to courts-martial over *capital crimes* committed by soldiers, thus:

> "L. All crimes, *not capital*, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by general or regimental court-martial, according to the nature or degree of the offense, and by punished at their discretion."

They also wrote Article I of Section X of the revised articles adopted in 1776, as follows:

> "Whenever an officer or soldier shall be accused of a capital crime, or of having used violence, or of having committed any offense against the persons or property of the good people of any of the American States such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made, or in behalf of the party or parties, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate, and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall wilfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to the aiding or assist-

> ing to the officers of justice in apprehending such person or persons, the officer or officers so offending shall be cashiered."

The effect of this latter article was to expressly deny jurisdiction to military courts to try any soldier for a purely *civil crime* punishable by the known laws of the land and the combined effect of both articles was to altogether prevent a court-martial from trying a soldier for a *capital crime* even though it were prejudicial to good order and military discipline and came within the category of military offenses. This court has held that no military tribunal from the year 1775 to 1863 had power within the United States to punish for capital offense. It was not until the year 1863 (Act of March 3, 1863, Sec. 30, Stat. 736) that courts-martial were given power "in time of war, insurrection or rebellion" to punish for *capital crimes.* (*Caldwell* v. *Parker,* 40 S. C. 388, l. c. 389.) Thus:

> "It is to be observed that by this section there was given to courts-martial, under the conditions mentioned, power to punish for capital crimes, *from which their authority had been from 1775 expressly excluded.*"

During the eighty-eight years between 1775 and 1863 the military tribunals of this country were *expressly denied power* to impose punishment for a capital crime. The statutes conferring jurisdiction on such tribunals to punish "all disorders and neglects * * * to the prejudice of good order and military discipline" were enacted during the revo-

lution when war was flagrant and where in many instances the courts were closed. The country successfully prosecuted the war of the revolution; the war of 1812; the Mexican war, and the countless wars on the frontiers with the Indians which redeemed the Great West from savagery and burned it into powerful and opulent states of the American Commonwealth with armies in which no tribunal existed which had power to impose the death penalty on soldiers. During the civil war and Spanish wars and the incidental Philippine insurrection the Articles of 1863 controlled and these gave army tribunals to punish capital crimes only where the civil courts were closed. That statute "had no application to territory where the civil courts were open and in the undisturbed exercise of their jurisdiction." (*Coleman* v. *Tennessee*, 97 U. S. 509; *Caldwell* v. *Parker*, 40 S. C. 388, l. c. 390.)

In the light of the foregoing facts of legal and political history and in the light of the rule that "a constitution must be interpreted with reference to the common law and previously existing legislation (Black Interp. of Laws, 19) it is difficult to understand how a court professing to have any regard for the facts of history or for the well established rules of constitutional interpretation can hold that the men who wrote and adopted the constitution and inserted the guarantees of liberty therein intended to authorize any department of the government to confer power upon another to reduce the manhood of the nation "to a state of servitude amidst a nation of freemen" and to make soldiers "an exception to the people

in general and the only state of servitude in the nation." Especially is this so in the light of the decisions of this and other Federal courts holding that the variety of common law set forth in Blackstone's Commentaries is the variety which the framers of the constitution and the people who adopted it intended to preserve in that instrument (Knobt's case, 10 Ct. Cl. 397 Aff. 95 U. S. 14; *Schick* v. *U. S.*, 195 U. S. 69.) In the last cited case in determining the meaning of the provisions of the Constitution guaranteeing trial by jury, it is said:

> "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it."

In the light of the foregoing, how can any reasonable mind conclude that the colonists intended to give the Congress power to introduce a system of slavery into these United States? The Mutiny Act never was in force in the Colonies. It was a statute enacted *after* the *establishment* of the colonial governments and could not be effective in the Colonies unless they were especially named. Furthermore, it was not suited to their conditions. No standing army was ever maintained in the Colonies. One of the causes for rebellion was the attempt of the British King to maintain

standing armies and protect them by mock trials for murders committed on the inhabitants of the Colonies. In the Declaration of Independence it is said:

> "He has kept among us in times of peace standing armies without the consent of our legislature.
>
> He has affected to render the military independent of and superior to the civil power.
>
> He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation.
>
> For quartering large bodies of troops among us.
>
> For protecting them by a mock trial from punishment for any murders which they should commit on the inhabitants of these states."

It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. (*Gulf Ry. Co.* v. *Ellis*, 165 U. S. 150; *McKeister* v. *Sager*, 163 Ind. 671; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S., l. c. 762; *American Fed. of Labor*, 33 App. Cas. [D. C.] 83; *In Matter of Jacobs*, 98 N. Y. 98; *People* v. *Warden of City Prison*, 157 N. Y. 116.) It was to destroy the odious standing army and forever prevent its alien incidents and the laws by which it was governed from becoming part of the law of the United States that the colonists rose in arms. Can the court hold that the colonists must be held to have intended to give Congress power to subject the citizens of this country to a law

similar to that Mutiny Act which Blackstone so vigorously denounced and lamented, especially in the light of the fact that the Supreme Court has held that (*Schick* v. *U. S.*, 195 U. S., l. c. *69*) Blackstone's brand of common law is that incorporated in the Constitution? To so hold it must construe the Constitution as the Acts of the English Parliament are construed. That is to say, it must proceed on the theory of the English Constitution that absolute, despotic power must in the theory of all governments reside somewhere and that that power is here intrusted to Congress as it is there intrusted to Parliament. (*Holden* v. *James*, 11 Mass. 396.) But the English Parliament "is at once a legislative and constitutional convention" (*State* v. *Associated Press*, 159 Mo. 410), and its power is so transcendent that it cannot be cribbed, cabined or confined either for causes or persons within any bounds. (*Davis* v *State*, 68 Ala. 58.) Not so the Congress.

As it was therefore the right of a citizen who rendered military service to his country at common law when charged with crime to be tried by jury, so that right is his today. The Ninth Amendment expressly *commands* that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." When, therefore, a court holds that Congress undertook to write another exception into the third clause of the second

section of Article III of the Constitution so as t
make it read "The trial of all crimes, except i
cases of impeachment, *and except in cases arisi*
in the land and naval forces, shall be by jury," it
holds that Congress was transcending its power
and was arrogating to itself the same power as
the Parliament of England. But Congress has t
such power. Whenever a rule, whether it be o
evidence or substantive law, is embodied in t
Constitution and thereby clothed with the dignity
of a fundamental law it is binding on every de
partment of the Government and neither Con-
gress nor the Executive can change the rule after
the same fashion as the British Parliament.
(Emery's case, 107 Mass. 172; *Counselman* v.
Hitchcock, 142 U. S. 547; *Weeks* v. *United*
States, 232 U. S. 383.)

The claim that this question has been decided
against this contention by the cases cited by re-
spondents is not founded in fact. The question
here raised *has never been directly presented to a*
United States court so far as we can determine.
Those cases have proceeded either upon the theory
that the crime could be punished twice by *the*
courts of the same government because, forsooth,
it was an infraction of two laws civil and military
(a theory now exploded by the Grafton decision)
or on the theory that it was conceded by the
parties that if the petitioner was actually in the
land or naval forces the power of Congress was
plenary. In *no case has it been contended* that
Congress was without power to so legislate as
to deprive a conscripted citizen, or, for that mat-
ter, a soldier of the regular army, of his right to

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CARD 2

a jury trial if he was actually a soldier at the time he was charged with the commission of a capital crime against the United States.

The citations from the manual of courts-martial and the War Department bulletins do not aid the court. To cite such authority is to violate the maxim that "a matter, the validity of which is in issue in legal proceedings, cannot be set up as a bar thereto." (Broom's Legal Maxims, 8th Ed., p. 133.) *Non potest adduci exceptio ejusdem rei cujus petitur dissolutio.* (Bac. Max. Reg. 2.) *Bernardiston* v. *Soame,* 6 St. Tr. 1094.

Consequently the cases cited by respondent do not aid the court in the solution of the question now before it, for

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, *but ought not to control the judgment in a subsequent suit when the very point is presented for decision.* The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (*Cohens* v. *Virginia,* 6 Wheat 397.)

The words of David Dudley Field seem to be applicable to the issue here presented:

> "I could not look into the pages of English law—I could not turn over the leaves of

> English literature—I could not listen to the orators and statesmen of England, without remarking the uniform protest against usurpation, and the assertion of the undoubted right of every man, high or low, to be judged according to the known and general law, by a jury of his peers, before the judges of the land. And when I turned to the history, legal, political and literary, of my own country—my own undivided and forever indivisible country—I found the language of freedom intensified. Our fathers brought with them the liberties of Englishmen. Throughout the colonial history we find the Colonists clinging, with immovable tenacity, to trial by jury, Magna Charta, the principle of Representation, and the Petition of Right. They had won them in the Fatherland in many a high debate and on many a bloody field; and they defended them here against the emissaries of the crown of England and against the veteran troops of France. We, their children, thought we had superadded to the liberties of Englishmen the greater and better guarded liberties of Americans.' (Brewer's Orations, Vol. 6, p. 2154.)

If Congress has the absolute power contended for, then it has a right to enact a law *prohibiting* the trial of a soldier for any crime by any court civil or military. Suppose Congress should be composed of men who subscribe to Napoleon's idea that "the worse the man, the better the soldier; if soldiers be not corrupt, they ought to be made so." Is it not probable that such a law would be passed by such men? Would such a law be constitutional? Respondent will hardly contend

that it would be. Yet, if the power of legislation over the subject matter be plenary, as respondent contends, such a law would be constitutional on the ground that it would make for the efficiency of the land forces.

Randolph's Committee Draft contained a legislative power "to enact Articles of War." This was changed to "make rules for the government of the land and naval forces." (Vol. 8, Am. Stat. 159.) The Massachusetts, New Hampshire, Virginia and North Carolina conventions recommended amendments to the Constitution which would have deprived persons in the land and naval forces not only of the right to be indicted by a grand jury, but in addition thereto of the right to a trial by a jury. The significance of the change from those recommendations shown in the Fifth Amendment is apparent. By that change such persons are not entitled to be indicted by a grand jury, but they are entitled to be tried by a jury. In *Shick* v. *United States*, 195 U. S. 65, l. c. 69, 70, a similar change was made in the provision of the original Constitution requiring that all crimes shall be tried by a jury. Said the court: "The significance of this change cannot be misunderstood." It follows that the change was made so as to preserve the right of trial by a jury to soldiers as it had existed from time immemorial according to the laws and customs that had existed in England.

In *Ex parte Reed*, 100 U. S. 13, the Supreme Court says that the courts-martial established by Congress for punishment of offenses in the navy is the successor of the old Court of Chivalry.

That court had only such jurisdiction as the common law did not recognize. (Blackstone Com., Bk. 1, p. 84.) It thus appears that the articles of war have created a tribunal and subjected the citizens, swept into the army by the draft law, to a jurisdiction which is not only foreign to our Constitution and unacknowledged by our laws, but was foreign to the Constitution and unacknowledged by the laws of England. It is like the Court of Star Chamber and as secret and arbitrary in its processes. All the analogies demonstrate that Congress in enacting Section 1342, R. S. U. S., if it means what respondent contends, enacted a law which was not only *unnecessary*, but *improper*, for the government and regulation of the land forces mustered according to the provisions of the Selective Service Act, while within the geographical limits of the states of the Union when the courts were open. It is significant that the second clause of Section 3 of Article 4 of the Constitution, giving Congress power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States, has been held not to authorize Congress by legislation to deprive the inhabitants of such territories of the benefit of the constitutional right of trial by a jury. (*Thompson* v. *Utah*, 170 U. S. 355, 1 Pet. 545, 141 U. S. 180.) If in passing upon that subject matter the Supreme Court was justified in holding that Congress had no plenary power over the inhabitants of such territory with respect to depriving them of the right of trial by jury when charged with crime, by the same token it ought to be justified in similarly ruling on the

question here presented. A territorial court is not a reservoir of the judicial power mentioned in the Constitution of the United States. (*McAllister* v. *U. S.*, 141 U. S. 174.) Neither is a court-martial. (*Kurtz* v. *Moffet*, 115 U. S. 487.) Yet it has been held that a citizen tried in one court is entitled to a jury trial such as the Constitution contemplates. If this be true in one case, why not in the other? "The propriety of a law in the constitutional sense must always be determined by the nature of the powers on which it is founded." (Hamilton. Federalist, No. 33.) That is to say, even though the end sought to be attained be legitimate, yet Congress is not authorized to enact a law to accomplish such end merely because it is legitimate or because it makes the government stronger. (Legal Tender Cases, 12 Wall 543.)

Suppose the Fifth Amendment had never been adopted, what would the law have been? It would have been that set out in Clause 3, Section 2, Article III, of the Constitution. That is to say: "The *trial* of all crimes except in cases of impeachment shall be by jury." Manifestly under that provision, cases in the land forces came under the same rule at least with reference to the mode of accusation. This for the reason that it was found necessary to exclude cases arising in the land and naval forces from the benefit of that part of the Fifth Amendment requiring indictments by grand juries. And as it has been held (*Grafton* v. *U. S.*, 206 U. S. 333) that the protection of the other provisions of that amendment can be invoked by soldiers, it follows that they can invoke every constitutional provision that a

citizen can invoke save that from which they have been expressly excepted. If the power given to Congress to make laws *necessary* and *proper* to give effect to the rules it might make for the government of the land forces of its own force denied the right of a person in the land force not to be held to answer for a capital or infamous crime without indictment or presentment of a grand jury, why was such a provision in the Fifth Amendment necessary? The answer is that the power given to make laws *necessary* and *proper* to give effect to the rules for the government and regulation of the land and naval forces as *construed* by the *people themselves* at the time did not give Congress plenary power to subject soldiers to accusation or trial *except in the same manner and form as every other citizen.* The construction placed on the Constitution by the people who adopted it is binding on this court. (*Ex parte Bain*, 121 U. S. 1.) The Fifth Amendment was adopted to prevent trials for infamous crimes upon information merely such as had been pursued in England (*Hurtado* v. *California*, 110 U. S. 516) and as now practiced with reference to misdemeanors by the United States (*Schick* v. *U. S.*, 195 U. S. 65.)

The exception of "cases arising in the land and naval forces" from the provision concerning the *mode of accusation* was a recognition that otherwise such cases were not excepted by the provision giving Congress power to make rules (in such cases) for regulating and governing the forces from the rule of law applicable to every other citizen. (*Gibbons* v. *Ogden*, 9 Wheat 438;

Brown v. *Maryland,* 12 Wheat 438.) In the latter case it is said: "The exception of a particular thing from the general words proves that *in the opinion of the law-giver* the thing excepted would be within the general clause had the exception not been made." Whatever may be said of the rule of contemporaneous construction by those charged with the *execution of a law* that rule must give way to contemporaneous construction by those who *made the law.* And those who *made the law* (that is, the people who adopted the Constitution) by adopting the Fifth Amendment demonstrated that the original Constitution did *not give Congress plenary power* over the method of putting soldiers upon trial for their lives. The question then arises, what is the extent of the exception contained in the words "except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger"? It is a rule that the "exceptions from a power mark its extent," (*Gibbons* v. *Ogden,* 9 Wheat 191) and also a rule that "where no exception is made in terms, none will be made by mere implication or construction." (*Rhode Island* v. *Massachusetts,* 12 Pet. 722; *Cohen* v. *Virginia,* 6 Wheat 378.) It is a maxim of interpretation that "an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted. *Exceptio Probat regulam de verbus non exceptis.*" (*Bend* v. *Hoyt,* 13 Pet. 271.) Had the people intended to except the *mode of trial* as well as the *mode of accusation* from the operation of the Constitution would they not have said so? Had they intended another ex-

ception why did they not write it? It is evident that they would have done so if they had any such intention. *In re Bauman*, 96 Fed. 948, was a case where the court was asked to imply an exception into the law in addition to that already there. Said the court:

> "If another exception had been intended, it would have been expressed along with that which was significantly declared."

In the solution of constitutional questions the same rules of interpretation, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power (*Adams* v. *Storey*, 1 Fed. Cas. 66; *Rhode Island* v. *Mass.*, 12 Pet. 722). The rule that an exception will not be written into a statute when it would have "been easy for the law making power to say so," (*Ry.* v. *Grant*, 98 U. S. 689; *National Bank* v. *Matthews*, 98 U. S. 627; *U. S.* v. *Koch*, 40 Fed. 252; *In re* Drake, 114 Fed. 232; *Austin* v. *U. S.*, 155 U. S. 432), applies to the construction of a constitutional provision.

The clause in the Fifth Amendment requiring an indictment, except in cases arising in the land and naval forces, concerns a matter of *mere procedure* (*Hurtado* v. *California*, 110 U. S. 516; *Duncan* v. *Mo.*, 152 U. S. 377; *State* v. *Thompson*, 141 Mo. 408; *State* v. *Kyle*, 166 Mo. 287; *Hodson* v. *Vermont*, 168 U. S. 262; *State* v. *Jones*, 168 Mo. 398), and a change in the law after the commission of a crime authorizing the state to require the accused to answer for same upon an

information rather than upon an *indictment* is not *ex post facto*. (*Duncan* v. *Mo.*, 152 U. S. 377; *State* v. *Thompson*, 141 Mo. 408; *State* v. *Kyle*, 166 Mo. 287.) The common law did not require a presentment or indictment in all cases where the rights of a subject were involved as a condition precedent to requiring him to answer for a capital or infamous crime. (*Hurtado* v. *California*, 110 U. S. 516.) The opinion of the court in the Hurtado case discloses that Magna Charta did not require a presentment or indictment by a grand jury to be found before a subject could be put upon his trial for a crime. It appears from that opinion that the substantial right protected by the phrase "due process of law" in the Fifth Amendment to the Constitution and by the kindred phrase "law of the land" in Magna Charta referred to the *trial only*, and not to the manner in which the charge upon which he was tried was formulated or sworn to. Thus:

> "It is the *forensic trial*, under a broad and general law, operating equally upon every member of our community, which the words, 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make *essential to the safety of the citizen*, securing thereby both his liberty and his property."

The court sets out the complete amendment on page 534 of the opinion and then in a few terse phrases applying the rule that no words in a Constitution will be deemed superfluous, demonstrates that the clause concerning indictments is

not included in the clause forbidding deprivations without due process of law, thus:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled on any criminal case to be witness against himself. (It then immediately adds): 'Nor be deprived of life, liberty, or property, without due process of law.'
>
> According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini* the institution and procedure of a grand jury in any case."

In the light of the foregoing principles it is singular that the insertion of a provision concerning *procedure* in the Fifth Amendment to the constitution should have been construed by Congress as justifying it in enacting a law by which it undertook to deprive millions of the citizens of this country of their substantial rights under the constitution. The only decision by a court of the United States in which this subject has received

"expressly excluded" by a law passed by the Continental Congress in force when the Constitution became effective. The decisions, with one accord, hold that it is the rights which were secured to the subjects by the *common law* and not those denied by the *statute* law of England which were intended to be secured by the constitutional provision. Magna Charta, the Bill of Rights, and the petition of right merely constituted a recognition of rights which had theretofore existed at and been secured by the *common law.* The English Mutiny Act was a statute in derogation of the rights of the Englishman at common law. There is no decision by the Supreme Court of the United States holding that the common law rights preserved in the Constitution with reference to jury trial have been modified by any English statute or by any American War Emergency Statute enacted in derogation of the common law. If the statement of the Supreme Court concerning the constitutional guaranty of the right to jury trial, to-wit: "That the provision is to be interpreted in the light of the principles which, at *common law,* determine whether *the accused in a given class of cases* was entitled to be tried by a jury" (*Callan* v. *Wilson,* 127 U. S. 540, l. c. 549) means anything, then it follows that the provision cannot be interpreted in the light of the statutes which in the year 1774 determined whether or not an *English soldier* was entitled to a jury trial in a *capital case,* but rather in the light of the American statutes then in force expressly recognizing such right in an American soldier. The interpretation contended for would destroy every con-

stitutional right now enjoyed by both soldier and civilian and would in fact destroy the constitutional guaranties. In 12 C. J. 710, it is said:

> "The bills of rights inserted in the American constitutions contain a declaration of general principles as a basis of government, copied from Magna Charta and the English Bill of Rights of 1689. These bills are regarded as parts of the constitutions in which they are recited, and are to be construed with other constitutional provisions. But in view of their origin and long use, they cannot be regarded as introducing new matters or prescribing new conditions. Their purpose is to preserve ancient principles rather than to establish modern principles."

The Articles of War and the Mutiny Act represented *modern* and were antagonistic to *ancient* principles. Furthermore, the Articles of War of 1774 and thereafter, in England, to and including the year 1803 were not statutes enacted by parliament but were merely rules promulgated by the King and posted over the garrison gates and the doors of the soldiers' barracks as a chief of police nowadays promulgates his orders for the direction of his subordinates. Those Articles of War thus promulgated by George III at a time when his troops were about to pillage and plunder the colonists were in direct violation of the provisions of the Mutiny Act of 1689, which contained the following provisos:

> "Provided always that nothing in this Act contained shall extend or be construed to

> exempt any officer or soldier whatsoever from the ordinary process of law."

It is a singular rule of construction which would attribute to the forefathers the intent to incorporate a power in the Constitution which was merely a lawless exercise of a supposed prerogative exercised in direct violation of Magna Charta, the Petition of Right, the Common Law and the Mutiny Act. Respondent claims that the Crown always exercised the right to make rules for the government and regulation of the land and naval forces which would warrant the infliction of penalties not extending to loss of life or limb and that the petition of right, the Bill of Rights and the Mutiny Act recognized this right on the part of the Crown as lawful. We find, however, an express recital to the contrary in the Mutiny Act where it is said:

> "And whereas noe Man may be forejudged of Life or Limbs *or subject to any kinde of punishment* by Martial Law or in any other manner than by the Judgment of his Peeres and according to the knowne and Established Laws of this Realme."

Respondent cites a British author named Samuel as authority for his contention that at the common law soldiers were not entitled to be tried by a jury. That is to say, he contends that the statements of Coke, Hale, Blackstone, Macaulay, Green and other jurists and historians are unworthy of credit on this question because Mr. Samuel writes something to the contrary in a work which he en-

titles "British Military Law." This contention justifies us in saying that Mr. Samuel's book is not a book of acknowledged authority except in so far as respondent regulates his conduct by it. We assert that no book of acknowledged authority can support respondents' contention. We quote from 4 Wall., page 76, and apply the remarks therein contained to this phase of respondent's argument, thus:

> "When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to dishonor the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. Court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders."

So that there may be no question as to what the rule was at common law as to whether or not a soldier was entitled to be tried by his peers at a time when the courts were open, we quote from the reports of the trials in the cases of Strafford, 3 St. Tr. 1382, and Lancaster, 1 St. Tr. 39. The reports of those cases show that the King, Lords and Commons solemnly decided that it was a violation of the rights of the soldier at common law to try him by a court-martial and not by his peers when the courts were open. The Strafford case

was decided in 1641. The charge against Strafford contained the following allegation:

> "That according to such his declarations and speeches, the Earl of Strafford did use and exercise a power above, and against, and to the subversion of the said fundamental laws and established government of the said realm of Ireland; extending such his power to the goods, freeholds, inheritances, liberties, and lives of his majesty's subjects of the said realm; and namely, the said Earl of Strafford, the 12th day of December, 1635, *in the time of full peace*, did in the said realm of Ireland give, and procure to be given, against the Lord Mountnorris (then and yet a peer of the said realm of Ireland, and then Vice-Treasurer and Receiver-General of the realm of Ireland, and Treasurer at War, and one of the Principal Secretaries of State, and Keeper of the Privy-Signet of the said kingdom), *a Sentence of Death by a Council of War called together by the said Earl of Strafford*, without any warrant of authority of law, or offence deserving any such punishment. And he the said Earl did also at Dublin, within the said realm of Ireland, in the month of March, in the 14th year of his majesty's reign, without any legal or due proceedings or trial, give, and cause to be given, a Sentence of Death against one another of his majesty's subjects, whose name is yet unknown; and caused him to be put to death in execution of the same Sentence."

The answer to this charge on the part of the defendant was:

> "The Deputies and Generals of the Army have always executed martial law, which is

necessary there: and the Army, and the members thereof, have been long time governed by printed Orders, according to which, divers, by sentence of the council of war, have formerly been put to death, as well in the time of peace as war. The Lord Mountnorris *being a captain of a company in the Army*, for *mutinous words* against the said Earl, general of that army, and upon two of those ancient Orders, was proceeded against by a Council of War, being the principal officers of the army, about twenty in number, and by them, upon clear Evidence, sentenced to death."

The foregoing were the written pleadings. At the trial the managers of the impeachment are reported to have charged and given evidence concerning the above quoted charge thus:

"Against the lives of the king's subjects, both in the Case of the Lord Mountnorris, and also of another of the king's subjects, both of whom he had sentenced to death by Martial Law, contrary to all law, and to the manifest subversion of the privileges of subjects, Magna Charta, and the Petition of Right.

To the Lord Mountnorris's Case he replied:

'1. That though that Sentence had been unjustly given and rigorously prosecuted against him, yet the greatest crime that he could be charged withal, would but amount to manslaughter, or felony at the most. 2. That he hoped, though this were true, to obtain a pardon from his gracious master the king's majesty, as well as Conway and sir Jacob Astley had lately done, for exercising martial law in the northern army.'

Then he replied to all the parts of the Charge, which were four:

1. That he had exercised Martial Law in time of peace.

To this he answered, '1. That all armies have been, and must be, governed ever by martial law. 2. That there is a standing Army in Ireland, and therefore the case is all one in time of peace or war; and *that the army might be undone if they should not use Martial Law, but were to expect remedy for the settling of a mutiny, or assurance of obedience, from the common law.* 3. That it had ever been the practice of the Deputies, particularly of Wilmot, Falkland, Chichester, yea Cork himself; and therefore was no new thing brought in by him. This he proved, both by the production of the military Ordinances, and by divers witnesses who knew Sentences given in that kind by them. 4. That he had a particular Warrant in his Commission for this power. 5. That in the Lord Mountnorris's Case, he was commanded to exercise the same by the king's particular Letter: both which he caused to be read.'"

The contention of Strafford that he was justified as general of the army, beyond the geographical boundaries of England and therefore entitled by the law martial to try soldiers in his army in time of peace for mutiny by court-martial was answered by Mr. St. John, the king's solicitor, who demonstrated that the common law of England had been extended to Ireland by King John and afterwards by King Henry III by Act of Parliament held in England as appears by the patent rolls of the Thirtieth Henry III (3 Stat. Tr., l. c. 1501). It was therefore held that the soldiers were entitled to be tried by jury in the courts of the common law

and that Strafford in erecting a military tribunal within the king's dominion in time of peace and trying the king's soldiers by a military court, was guilty of treason and should be attainted (3 Stat. Tr., l. c. 1518). The Bill of Attainder recited that Strafford was guilty of endeavoring to subvert the ancient and fundamental laws and government of his majesty's realms of England and Ireland and to introduce an arbitrary and tyrannical government against law in the said kingdoms and for exercising a tyrannous and exorbitant power over and against the liberties of the said kingdom and the liberties of estates and lives of his majesty's subjects. Strafford was found guilty of more than murder in convening a court-martial, as the respondent Baker has done, and trying a soldier in a country to which the common law had been extended by an English statute and carried by the English colonists to Ireland in that early day. That decision as to what the common law was on the question here involved has always been recognized as the law of England by every historian, jurist and court worthy of the name by which the subject has been discussed since that time.

In the report of Lancaster's case, 1 St. Tr. 39, it appears that Lancaster was tried in the year 1322, before a court-martial in time of peace and at a place where and when the courts were open. Five years thereafter, the sentence and attainder incident to the sentence were reversed in the first parliament of Edward III for the reason that the King through his military court imposed sentence without having arraigned Lancaster as the law required before a tribunal composed of his peers

as required by the Great Charter of the liberties of England. The Lancaster case was decided in the year 1327, when every English peer was an English soldier because he held his lands in consideration of the rendition of military services. Lancaster therefore was a soldier. On page 46 of the report the reason for the reversal is thus given:

> "—and so, without arraignment and answer, the said Thomas erroneously and against the law of the land, in time of peace, was sentenced to death; by reason whereof, because it is notorious and manifest that the whole time in which it was charged against the said Earl, that he committed the aforesaid offenses and crimes in the aforesaid record and proceeding contained, and also the time when he was taken, and when the said lord the king's father, etc., caused it to be recorded that he was guilty, and when he was sentenced to death, was time of peace; in particular because throughout the whole time aforesaid, the chancery and other places of the courts of the lord the king were open, and in them law was done to every one as it used to be done; * * * the aforesaid lord the king's father, etc., ought not, in such time of peace, to have caused such record to be made against the said Earl, nor to have sentenced him to death, without arraignment and answer: Also, he says, that there is error in this, that whereas the aforesaid earl Thomas was one of the peers and great men of this kingdom, and in the Great Charter of the Liberties of England it is contained, that no free-man shall be taken, imprisoned, or disseised of his freehold or franchise, or his free customs, or outlawed,

> or banished, or in any manner destroyed, nor shall the lord the king, by himself or others, proceed against him, but by the lawful judgment of his peers, or by the law of the land, the earl Thomas was by the record of the lord the king as aforesaid, in time of peace, erroneously sentenced to death without arraignment or answer, or the lawful judgment of his peers, against the law, etc., and against the tenor of the aforesaid Great Charter."

We think that these two decisions rendered by the highest court in England and cited by the Supreme Court of the United States with approval in the Milligan case demonstrates that at the common law a soldier charged with crime against his country was entitled to be tried by his peers when the courts were open. They also demonstrate that the statements contained in the histories of every reputable Engli-' historian to the effect that the soldier and civilian were similarly liable to be tried before the civil courts by their peers to the exclusion of military courts, rests upon a solid foundation and that the work of Mr. Samuels, cited by respondent, is unworthy of consideration in the light of those decisions and histories. The law as laid down in these decisions is expressly followed by the trial court in *Ex Parte Henderson*, 11 Fed. Cases, No. 6349, where it is said:

> "—the common law of England knew nothing of courts-martial and made no distinction in time of peace between a soldier and any other subject. A soldier, therefore, by knocking down his colonel incurred only the ordinary penalties of assault and battery, and by refus-

ing to obey orders, by sleeping on guard, or by deserting his colors incurred no penalty at all."

The claim that the forefathers were accustomed to the trial of soldiers by courts-martial without juries because George III promulgated certain Articles of War for the government of the English standing army, even if well founded, does not warrant the conclusion that the provisions in the Constitution guaranteeing the right to jury trials could not be invoked by soldiers. This for the reason that those provisions are "to be interpreted in the light of the principles which at common law determine whether the accused in a given class of cases was entitled to be tried by a jury" (*Callan* v. *Wilson*, 127 U. S. 540, l. c. 549). Furthermore, to reach that conclusion the court would be compelled to ignore the prohibition contained in the Articles of 1775, noted in *Caldwell* v. *Parker*, *supra*.

The point that the dual nature of our governments operates to make the states of the Union foreign countries because the criminal jurisdiction of the Federal Courts is restricted, is a rather strained contention in view of the fact that a soldier charged with crime is entitled to have his cause removed to the Federal Court and hence, soldiers can be tried for all crimes committed within the geographical limits of the states of the Union in the Federal Courts (Art. War 117; Tenn. v. *Davis*, 100 U. S. 257). Respondent contends that the concession of petitioners that naval courts-martial have jurisdiction over persons in the naval

forces is tantamount to a concession that such courts have jurisdiction over men in the land forces for the reason that the constitutional provisions concerning the making of rules and concerning the mode of accusation of persons for capital or infamous crimes refer to land and naval forces in the same lines of the Constitution places such persons on the same basis. We think this suggestion is answered by the consideration that the Constitution is operative only within the geographical limits of the states of the Union of its own force without legislation extending it. (Ross Case, 140 U. S. 453; *Dorr* v. *U. S.*, 195 U. S. 138.)

It is also answered by the consideration that this court has ruled that the rights of the "men of the sea" must be held to be rights such as were recognized in ancient days in England, and that the "men of the land" may invoke the protection of the Constitution in cases where the seaman is without protection.

This is merely the application of the principle of the common law enunciated by Coke (Inst. 11, p. 50) concerning the phrase "law of the land":

> "(*Per legem terræ.*) i. *Per legem Angliæ*, and hereupon all commiſſions are grounded, wherein is this clauſe, *facturi quod ad juſtitiam pertinet ſecundum legem, et conſuetudinem Angliæ*, &c. And it is not ſaid, *legem et conſuetudinem regis Angliæ*, left it might be thought to bind the king only, nor *populi Angliæ*, left it might be thought to bind them only, but that the law might extend to all, it is ſaid *per legem terræ, i. Angliæ.*

These decisions of the Supreme Court warrant the conclusion that the land forces are to be governed in accordance with the methods followed at common law and the naval forces as they were governed by the naval law from time immemorial.

The very phase "Articles of *War,*" borrowed as it has been from England, shows that the power, if any, vested in the Congress to make Articles of *War* for the government of soldiers contemplates a time of war. If we were to supply or substitute the definition of the word "war" laid down in the Lancaster, Strafford and Milligan cases and by Coke and the other authors referred to, then the phrase would read "Articles of a *Time When The Courts Are Closed.*" The King, at the common law, did have authority to make Articles of War to govern the soldiers and the armies only when war was flagrant. He also had authority to make rules for the government and regulation of his guards, but he had no authority when the courts were open to punish them for violations of those rules in any case in which they were entitled to be tried on the charge by a jury at common law. This is the sort of power which was vested in the Congress by the clause giving it power to make rules for the government and regulation of the land and naval forces. It will be noted that the Constitution says "make." It omits to provide for power to "enforce" the rules so made by the infliction of such penalties as the commander of the forces may think proper. If any clause of the Constitution could be held to have given Congress power to provide a method of punishment for crime

apart from the method applicable to the average citizen it is the clause granting power to define and *punish* felonies committed on the high seas and against the law of nations. Yet Congress has never undertaken to provide for the punishment of such felonies when the culprits are brought to the United States other than by the ordinary courts.

We think that under all the authorities presented by us that all men within the geographical limits of the states of the Union are entitled to be tried by a jury when charged with an infamous crime and that they may be tried by a tribunal of which a jury is not a constituent part when the crime is merely a misdemeanor (*Shick* v. *U. S.*, 195 U. S. 95), and that Congress has only power to make rules for the government and regulation of the land and naval forces subject to the constitutional guaranties (*Grafton* v. *U. S., supra*).

In concluding this phase of the matter we again call attention to the fact that a court does not perform its constitutional duty if it pronounces the exercise of a power as lawful merely because of its exertion in practice since the beginning of the government. In *Ex parte United States,* 242 U. S. 27, the court devotes the fourth subdivision of the opinion to a consideration of the legality of a long continued practice on the part of the courts in suspending the execution of a sentence. Said the court:

> "—it cannot be denied that in both the state and Federal Courts, over a very long period of time, the power here asserted has been exercised, often with the express, and constantly

with the tacit, approval of the administrative officers of the state and Federal Governments, and has also been tacitly recognized by the inaction of the legislative department during the long time the practice has prevailed, to such an extent that the authority claimed has in practice become a part of the administration of criminal law, both State and Federal, not subject to be now questioned or overthrown because of mere doubts of the theoretical accuracy of the conceptions on which it is founded.

* * * * * * * * * *

Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the Constitution, since its exercise, in the very nature of things, amounts to a refusal by the judicial power to perform a duty resting upon it, and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal presents a grave situation. But *we are admonished that no authority exists to cure wrongs resulting from a violation of the Constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future.*"

If the air of England was "too pure for a slave to breathe in" in Mansfield's day (Sommersett's

case, 20 St. Tr. 1), should the same not be said of the atmosphere within the geographical limits of the states of the Union? As Mansfield did not hesitate to disregard the *practice* which had hitherto obtained in England in applying the law, neither should this court hesitate. We think the language in that case applicable here:

> "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its forces long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say that this case is allowed or approved by the law of England; and therefore the black must be discharged."

The service of a soldier is the service of a freeman (*Arver* v. *U. S.*, 245 U. S. 366); his subjection to a system of punishment not proportioned to offenses he may commit and by a power not expressly warranted by the Constitution on the whim of his commander is subjection to a condition of slavery (Coke, Inst. 4, 332; Blackstone, Bk. 1, p. 416).

III.

The express recognition in the first Articles of War adopted by the Continental Congress of the right of a soldier charged with a capital crime, during time of war, to a trial by jury, and the ex-

ecutive, legislative and judicial recognition of that right during all the wars in which this country was engaged until 1863, was merely a recognition of the right in that respect enjoyed by soldiers at common law, and the rule that the provisions of the Constitution concerning the right to trial by jury will be interpreted with reference to the common law and previously existing legislation in connection with the rule that a practical interpretation of a law by all the departments of the Government for a long series of years demonstrates that the Constitution itself expressly preserves a soldier's right to be tried by a jury when charged with a capital crime, and that Congress under the guise of making rules for the government and regulation of the land forces can never take it away.

When we consider that the Continental Congress in the year 1774 adopted the Declaration of Rights declaring "that our ancestors who *first settled these colonies* were at the time of their emigration from the mother country entitled to all the rights, liberty and immunities of free and natural born subjects within the realm of England," and that when the colonies were first settled no law had been enacted in England giving a military tribunal power to try a soldier for a capital crime either in peace or war, and that the Mutiny Act had not yet been enacted by the English Parliament, that in the foregoing Declaration of Rights it was further declared "that by such emigration they by no means forfeited, surrendered or lost any of these rights * * * that the respective colonies are entitled to the Common Law of Eng-

land, and more especially to the great and estimable privilege of being tried by their peers of the vicinage, according to the course of that law, and that said Congress in the year 1775, in adopting the first Articles of War, establishing "the generic power of courts-martial" (*Caldwell* v. *Parker*, 251 U. S. —), expressly denied the power of courts-martial to punish soldiers for capital crimes, either in peace or war, and that in practice for 12 years before and 76 years after the Constitution was adopted no military tribunal within the geographical limits of the revolting colonies or of the states of the Union ever lawfully undertook to try a soldier for a capital crime, either in peace or war (*Caldwell* v. *Parker*, 251 U. S. —), the conclusion is irresistible under all the rules of constitutional interpretation that no person within the geographical limits of the United States, be he soldier or civilian, alien or citizen, immigrant or native, can ever be deprived of his life by the executive power under legal forms while the courts are open unless it be by virtue of a verdict of a jury of his peers. The crimes made punishable by the 92nd Article of War are capital crimes. (*Motes* v. *U. S.*, 178 U. S. 458).

IV.

The words "but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace," prohibited courts-martial from trying petitioners for the reason that on the 29th day of July, 1918,

the courts were open in the State and District of Kansas and within the geographical limits of the States of the Union and the District of Columbia and hence it was a time of peace within the meaning of the 92d Article of War.

The fact that Congress did not use the words "United States" instead of the words "geographical limits of the States of the Union and the District of Columbia" is significant. The words "United States' would cover the territory included within the "geographical limits of the States of the Union and the District of Columbia" and exclude Alaska and the Island Possessions. The use of thirteen words instead of two indicates that Congress had a purpose in their use. Had the words been "no person shall be tried by court-martial for murder committed within the United States in time of peace," then if war existed anywhere in the United States a court-martial would have jurisdiction because it would not be a time of peace within the United States. But if war existed in one of the States of the Union only, it would be a "time of peace" in all the other states of the Union and in the District of Columbia. Would the statute under such circumstances authorize a trial by court-martial in such other states or District of Columbia?

We submit that it would not in the light of the rules of grammatical and statutory construction. If we supply the ellipsis this will be apparent. Thus:

> "—no person shall be tried by court-martial for murder * * * committed within the

> geographical limits of the states of the Union and the District of Columbia in time of peace (within the geographical limits of the states of the Union and the District of Columbia)."

Why designate the geographical limits of the states of the Union and of the District of Columbia severally rather than the geographical limits of the entire nation? Manifestly the *geographical limits* of the District of Columbia were not mentioned without some purpose. But if those geographical limits are to figure in determining the jurisdictional question, then the phrase "time of peace" must have something to do with the limits of the District of Columbia and of each state.

The phrase "time of peace" refers to a time of peace in some state or country. It cannot mean that if a war exists somewhere on earth that such war may deprive the courts of jurisdiction. The question is: Where must the war exist which destroys jurisdiction, and vests jurisdiction to take the life of an American citizen? That question is answered by the decisions of the courts defining the phrase "time of peace."

In *Ex parte Milligan*, 4 Wall, l. c. 128, the Supreme Court of the United States quoted with approval the declaration of the Parliament of England in reversing the attainder of the Earl of Lancaster in the first year of the reign of Edward the Third, defining the phrase "time of peace" thus:

> "—in the time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to

answer and that regularly *when the King's courts are open it is a time of peace in judgment of law.*"

Lancaster was a soldier in the service of his King and country and was guilty of rebellion but notwithstanding his trial and conviction by court-martial was solemnly denounced by the great court of the realm as illegal. The chief justice, concurring in the Milligan case, said:

> "Where peace exists, the laws of peace must prevail."

It thus appears that a time of peace exists *where* peace exists and that for jurisdictional purposes, peace exists *where* the courts are open. In Prize Cases, 67 U. S. 635, l. c. 666, it is said:

> "War has been well defined to be, 'That state in which a nation prosecutes its right by force'. * * * The true test of its existence as found in the writing of the sages of the common law, may be thus summarily stated: 'When *the regular course of justice is interrupted* by revolt, rebellion or insurrection, so that the courts of justice cannot be kept open, *civil war exists.*"

In Coke's Com. on Litt. Lib. iii, chap 7, s. c. 412, p. 249, 6, as quoted in Law, Wheat. Int. Law, p. 525, note, it is said:

> "When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be

> *time of peace.* So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped so as the courts be, as it were, shut up, *et silent inter leges arma,* then it is said to be time of war."

The phrase "time of peace" used in the 92d Article of War is thus shown to have acquired a settled meaning at common law and that said meaning has been adopted by the Supreme Court. Under the rules of statutory construction, Congress must be held to have intended to use the phrase for the same purpose and in the same sense as it had been understood at common law. Endlich, in his Interpretation of the Statutes, Section 3, says:

> "Where a term used in a statute has acquired at common law a settled meaning, that is ordinarily the technical meaning which is to be given to it in construing the statute. * * * The reason in all such cases for adopting the technical common law sense of words is 'because they have a definite meaning which is supposed to have been understood by those who were, or ought to have been learned in the law.' And the rule applies equally in State and Federal courts as to the meaning of state legislatures and of Congress. * * * Accordingly the meaning of murder, robbery, in an act of Congress, is to be determined by the common law and so the word forfeiture with relation to the time when the same should take effect as to personalty or realty when the statute leaves the intention of Congress in this particular undefined."

In *Kepner* v. *United States*, 195 U. S., l. c. 124, it is said:

> "It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. The Abbotsford, 98 U. S. 440."

It thus appears that the concrete meaning of the phrase "time of peace" without reference to other rule of statutory construction shows that a court-martial is powerless to try a soldier for either of the offenses mentioned in the 92d Article of War in this country where the courts are open. In every instance where the courts can administer justice according to law, a court-martial has no jurisdiction to try a soldier any more than it has to try a civilian in any state of the Union or the District of Columbia.

V.

The law recognizes a distinction between domestic and foreign war and the question as to whether or not a state or time of war existed in so far as personal rights are involved is to be determined by the records and judges of the courts of justice and not by the records, officers or acts of any other department of the Government.

Whenever the rights of the subject with reference to those tenures which are known as "military" were involved, the courts at common law did not look to the King or Parliament or to

any acts of either King or Parliament to determine what those rights were. In other words, whenever the rights of a subject in his military capacity were involved within the geographical limits of England, those rights were determined by the courts. It was held by those courts in the reign of Edward III, that a tenant of the King who owned a knight's fee and consequently was liable to render forty days service to the King in his wars in each year could not be held in legal contemplation to have begun to discharge his obligation until he *entered the foreign country with which the King was at war*. It was held that the war did not begin until then and that until the King and his host reached the foreign country they "were said to go towards the war." It was contemplated that persons rendering military service to the King should be "mustered," that is, appear before the King's Commissioners in the open field, well armed and *trained*. Consequently the preparation period did not in legal contemplation amount to service in war.

According to the common law, if any one seized by any means whatsoever of the inheritance of a corporeal hereditament dies, whereby the same descends to his heir, in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold is taken away; and he cannot recover possession against his heir by this summary method, but is driven to his action to gain a legal seisin of the estate. And this because the heir comes to the estate by act of law, not by his own act; the law therefore protects his title, and will not suffer his

departed from their captain within the term contrary to the form of that statute, it was felony; because now that statute is of no force; because that ancient and excellent form of military course is altogether antiquated; but later statutes have provided for that mischief.

To muster is to make a show of soldiers well armed and trained before the King's Commissioners in the open field: *Ubi se ostendes praeludunt praelio.* In Latin it is, *censere, seu lustrare exercitum.*"

* * * * * *

"So as hereby it also appeareth concerning the point in law demurred in judgment in the seventh of Edward the Third, here mentioned by our author, the law accounteth unto the foreign nation; for *then the war beginneth,* and *till he come there, he and his host are said to go towards the war,* and no military service is to be done till the King and his host come hither."

Judge Cadwalader in *The Parkhill,* 18 Fed. Cas., p. 1187, 10755a, said:

"In the opinion of Grotius, Demosthenes had, in the case of the Thracian Cheronese, correctly stated the rule of public law to be that, wherever judicial remedies are not enforceable by a government against its opponents, the proper mode of restoring its authority is war. *Gro. De Jure,* B 23. The opinion of Grotius has given to this case, in which the views of Demosthenes prevailed at Athens, the force of a modern precedent. * * * —an English statesman, in a parliamentary debate upon a judicial question said, in the year 1696: 'You must provide for the government, and when you cannot do it by

force of law, then armies must do it when courts are shut up.' Speech of Harley, in Fenwick's case 13 Stat. Tr. 706. * * *

Force which acts upon the physical powers of man, and judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to our constitution, except as far as it shall be sanctioned by the latter. But let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more."

* * * * * *

"The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true: so that when the courts of a government are open it is ordinarily a time of peace. * * * The marshal of the United States, in order to keep the peace of his judicial district, and enable him to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a warlike force. Y. B. 3, Hen. VII, pl. 1; 5 Coke 72a; Br. Riots, pl. 2; Dall., c. 95; 8 Watts & S., 191; 5 C. & P., 254, 282. When he cannot, by such means, keep the peace in his district, and the courts in it no longer can direct the process to his, a state of war exists."

It thus appears that the judges of the olden time reached the same conclusion as the district judge in *Ex parte Mickell*, Fed. 817, that is, that though the country be engaged in a *foreign* war, yet that it is not a time of war in the home country where the soldiers are being trained for the fight. This is but recognition of a fact. A prize-fighter cannot be said to be fighting while preparing and before he gets in the ring. Hence he could not properly say that the time of preparation was a time of fighting. What is true of the individual is true of the nation.

VI.

With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no intention to take from them the jurisdiction which they had always exercised with respect to soldiers and citizens should be ascribed to Congress in the absence of clear and direct language to that effect, hence the prohibition denying jurisdiction to courts-martial to try soldiers for murder or rape in time of peace prevents such courts from trying such persons except at a time when martial law is in force and applicable alike to soldier and citizen.

The prohibition in the 92d Article of War against trying *any person* by courts-martial for murder committed within the states of the Union in time of peace *applies equally to soldier and*

citizen. It will be noted that the Twelfth Article of War provides:

> "General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles *and any other person who by the law of war is subject to military tribunals.*"

Article 92 provides:

> "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but *no person* shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace."

Jurisdiction is granted to try soldiers and civilians by Article 12 but this jurisdiction cannot be exercised as to "any person" within the limits of the states of the Union in time of peace, according to Article 92. The words "any person" necessarily include soldiers. One section grants jurisdiction as to persons subject to military law and to those not so subject. They are both placed on a plane of parity in the same sentence granting jurisdiction. Does it not necessarily follow that the words "no person" in the clause of the article *limiting jurisdiction* includes "any person subject to military law" and "any other person who by the law of war, etc.," included in the clause of the article *granting jurisdiction.* Both sections must be read together especially in the light of the fact that the old code was changed because it was

"unscientific in its arrangement." (Int. Manual for C. M., X.) The old 58th Article granted the jurisdiction, set out its limitations and prescribed the penalty for murder. The new 12th and 92d Articles grant the jurisdiction, define its limitations and prescribe the penalty. The jurisdiction granted includes "the capital offenses of murder and rape when committed in time of peace at places outside the geographical limits of the United States and the District of Columbia" (Introduction Manual for C. M., XI) and all persons who by the law of war are subject to trial by military tribunals regardless of the limits. But "no person" within those limits is subject to this jurisdiction "in time of peace." Are the words "no person" not sufficiently impersonal and all-embracing to include persons subject to the socalled "military law"? And if they are, do they not also include civilians? Before "persons subject to military law" can be held to be subject to a different rule from civilians in time of peace within the limits mentioned the court must write an exception into the proviso denying jurisdiction in time of peace.

So, after all, the distinctions, so-called, between military and martial law, are immaterial. The test, therefore, by which to determine whether or not the court-martial had purisdiction is: Could petitioners, had they been ordinary civilians, be tried for murder by court-martial for the crime? Unless the question can be answered affirmatively they must be discharged. This is not a contest concerning the words "military law" and "martial law," so far as petitioners are involved. Bacon's

animadversion on the controversies of the schoolmen who frittered away their time in empty discussion concerning the words in which men's ideas were clothed to the total exclusion of the facts of nature or of the subject matter presented would apply here. The variety of adjective used by military men or schoolmen to denote the substance of a thing does not change that substance. When a man is done to death contrary to law the fact that he lost his life by virtue of an excuse couched in the somewhat paradoxical phrases "military law" or "martial law" does not change the fact that those spurious adjectives do not excuse the violation of the right not to be done to death without due process of law. But we have not confused the so-called varieties of law. In support of their assertion, respondent cites the works of Davis and Birkhimer. These were officers in the army prior to the publication of the present manual and according to their ideas, military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the laws or usages of war." But it seems that since their works were published military jurisdiction has grown, for in the Manual of Courts-Martial (page 1, Clause 2), we find that the present manuals of courts-martial asserts that "Military jurisdiction is of *four* kinds." It thus appears that military jurisdiction has become infected with the progressive spirit of the age and that, while it is limited to *two* kinds during the administration of one Secretary of War, it may grow to *four* kinds during that of another by mere force of his will and without

legislative sanction. One of the kinds of military jurisdiction is thus defined in the Manual, page 2:

> "Martial law *applied to the army*: that is military power extending in time of war, insurrection, or rebellions *over persons in the military service, etc.*"

The introduction to the Manual for Courts-Martial, page xiii, thus defines "Military Law":

> "—in distinguishing military from civil law, we say that military law is the law relating to, and administered by, military courts."

It would seem that a court administering martial law is a "military court." Where, then, is the material difference herein? The individual who can point it out

> "—could well divide a hair twixt south and southwest side."

It is a distinction without a difference in so far as the question now before the court is involved. The phrase "Martial Law" in the English Mutiny Act and the Petition of Right denoted the same idea as the modern phrase "Military Law."

Congress has always been reluctant to take away the jurisdiction of the civil courts in cases involving the lives of civilians or soldiers for murder. In the case of *Coleman* v. *Tennessee*, 97 U. S. 509, l. c 514, in discussing this very question of liability on the part of a soldier for murder under the old 58th Article of War to be tried by court-martial alone, the court, holding

that because the murder was committed in Tennessee where actual war existed and the courts were closed, exclusive jurisdiction was vested in a court-martial, said:

> "Previous to its enactment, the offenses designated were punishable by the state courts, and persons in the military service who committed them were delivered over to those courts for trial; and it contains no words indicating an intention on the part of Congress to take from them the jurisdiction in this respect which they had always exercised. With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, *no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.*"

The words in the 92d Article of War "as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace" are new and in addition to the provisions of the old 58th Article of War, and take away the concurrent jurisdiction which the court in *Coleman* v. *Tennessee*, 97 U. S. 509, held (while indulging in dicta) was vested in civil and military courts.

Therefore the rule by which the right of a court-martial or military commission to try a civilian is determined, applies in the instant case. That rule has been properly pointed out by the Supreme Court of the United States and other

courts. In *Ex parte Milligan*, 4 Wall. l. c. 127, it is said:

> "If, in foreign invasions or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be 'mere lawless violence.'"

In *Griffin* v. *Wilcox*, 21 Indiana 370, l. c. 378, it is said:

> "When the courts of justice be open and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, *it is said to be*

time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma,* then it is said to be time of war." Coke upon Littleton, as quoted in Law, Wheat. Int. Law. p. 525.

* * * * * * *

Where the laws are, or may be, executed without the interference of the President by his military, he has no right thus to interfere.

* * * * * * *

"The war power of the President then, may be stated thus: He has a right to govern, through his military officers * * * when and where the civil power of the United States is suspended by force. In all other times and places the civil excludes * * * government by the war power. In all parts of the country, where the courts are open, and the civil power is not expelled by force the Constitution and laws rule. * * * If, in such parts of the country, men have not perpetrated acts constituting in law, crimes, their arrest, trial, and punishment by military courts, is but a mode of applying lynch law; is, in short, mob violence. This is so, unless the old English tory doctrine of government is secretly included in our constitution. That doctrine, as expressed by Filmer, is that 'a man is bound to obey the King's command against law: nay, in some case, against divine laws.' May's Const. Hist. Vol. 2, p. 21 note. Such was the maxim, the constitution, indeed, of Imperial Rome. '*Quod principi placuit legis habet vigorem.*' What pleases the Prince, has the vigor of law. Coop. Just. Inst. p. 9; 1 Black, Comm. p. 74."

In Hale's History of the Common Law, Runnington's Edition, London, 1820, pages 42, 43, it is said:

> "That the exercises of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land."

But respondent contends that the question as to whether a state of peace or war exists is to be determined by the war making department of the Government and that since Congress by resolution recognized the existence of war with the German Empire in April, 1917, that this resolution of its own force changed what was a state of peace into a state of war in the State and District of Kansas. He cites certain cases in support of this contention but those cases involved merely the question of the relationship of belligerents or statutes of limitations or kindred questions. Of course in such cases the decision of the political department of the government as to whether or not a state of war exists is controlling. They involve questions wholly different from a case where the jurisdiction of a court to try a citizen for his life because of an act punishable by the ordinary laws of a country in the civil courts thereof is involved.

This court in the recent case of *Caldwell* v. *Parker*, 40 S. C. R. 388, in substance and effect, decided the questions which must result in the reversal of the judgment of the court below. In

that case the court reviewed all of the Articles of War with reference to capital crimes beginning with that adopted by the Continental Congress in 1775 to and including the present Articles. The conclusion drawn by the court was a denial of the contention of the Government in a brief filed *amicus curiae*. The Government there contended that the effect of the Articles of 1916 was to vest exclusive jurisdiction in courts-martial in time of war. This contention was denied by the court in an opinion which inferentially questioned the power of Congress to grant such power. Said the court:

> "It cannot be assumed that the mere existence of a state of war begot of necessity the military power asserted since the Articles of War originally adopted in 1775, as we have seen in the very midst of the war for independence, modified in 1776 to make certain the provisions of the civil power."

The court further denied the contention based upon the words "except in time of war" and the cognate words "in time of peace" which were found in Articles 74 and 92. Thus:

> "Both these provisions took their origin in the Act of 1863 and were drawn from the terms of that Act as expressed in the revision of 1874. By its very terms, however, the Act of 1863 was wholly foreign to the destruction of state and the enlargement of military power here relied upon • • • but the Act did not purport to increase the general power of courts-martial by defining new crimes or by bringing enumerated offenses in

As applied to the soldiers of our country this would be one of the genuine marks of slavery, for it is one of those marks "to have the law which is our rule of action either concealed or precarious" (1 Black 416).

VII.

The armistice between the Allied Powers and Germany of November 11, 1918, ended the war with Germany as a fact, and also ended the power, existence and jurisdiction of a tribunal which was called into being only by the actual existence of a state of actual war. The 92d Article of War in the nature of things must be transposed to read, 'No person shall be tried (in time of peace) by court-martial for murder," etc. As the trial did not end until two weeks after the war ended, the sentence could not be promulgated by a moribund tribunal.

It should be taken into consideration that *as* a *fact* the war was ended fourteen days before the trial ended by the Armistice of November 11, 1918 (*In re* Egan, 8 Fed. Cas. 367, the Prize case, 67 U. S. 35). The sentence of the court was not promulgated until February 9, 1920, more than fifteen months after the war ended. This, of itself, even if it be conceded that the court-martial had jurisdiction while war was raging in Germany, destroyed the power of the court-martial to proceed with the trial, for the 92d Article of War declares that "no person shall be tried by court-martial for murder * * * committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

That is to say, "no person shall be tried by court-martial (in time of peace) for murder committed, etc." This transposition is justifiable for the reason that the only justification for the use of a military tribunal in such case is the state of war and when the war, which gave the tribunal life, ends the tribunal must necessarily die. The words "in time of peace" refer to all the precedent matters in the 92d Article, for it is a canon of construction that words in a statute prescribing a rule, standard or condition, according to which a citizen may be compelled to forfeit his life, apply to and control all the precedent matters in such statute. This was the rule which according to Coke (Inst. II., 45) the 29th Chapter of Magna Charta was construed. Thus:

> "—for these words, *per legem terrae*, being towards the end of this chapter, do refer to all the precedent matters in this chapter."

Justice Nelson, who wrote the dissenting opinion in The Prize cases, when on circuit, discharged the petitioner in the case of *In re Egan*, 8 Fed. Cas. 367, after his trial on a charge of murder by a military commission. The crime was alleged to have been committed in South Carolina on September 24, 1865, nearly a year before the proclamation ending the war. Said the court:

> "When a government or country is disorganized by war, and the courts of justice are broken up and dispersed, or disabled through the prevalence of disorder and anarchy, from exercising their functions, then

> is an end of all law; and the military power becomes a necessity which is exercised under the form and according to the practice and usage of martial law. As has been said by a distinguished civilian when foreign invasion or civil war renders it impossible for the courts of law to sit or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them and to employ for that purpose the military, which is the only remaining force in the community; and while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; *but no longer.* This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty and property of the citizen whenever it is called in question. * * * No necessity for the exercise of this anomalous power is shown. For aught that appears, the civil, local courts in the state of South Carolina were in the full exercise of their judicial functions as the time of the trial."

So, the only excuse which respondents can give for their extraordinary conduct in trying petitioners for murder is to affirmatively show that the civil, state and federal courts in Kansas were not functioning at the time of the trial.

For the purpose of jurisdiction, neither a formal declaration of war or proclamation of peace, nor its absence, is conclusive in determining the question. In The Prize cases, 67 U. S. 635, it is said:

> "Whether the hostile party be a foreign invader or states organized in rebellion, it is

> none the less a war, although the declaration of it be *unilateral.* * * * It is not the less a war on that account for *war may exist without a declaration on either side.* It is so laid down by the best writers on the law of nations. * * * The battles of Palo Alto and Resaca Da La Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized a state of war as existing by the act of the Republic of Mexico. * * *"

To the same effect is the decision in *Ford* v. *Surget,* 97 U. S. 594.

According to the definition cited by respondents, military law is the system of rules which governs the *army* in time of peace. Martial law is the system of rules which governs *all persons* in time of war. Respondent says he is operating under the system of rules applicable to a time of war which, by the very nature of the definitions on which he relies, would authorize the army officers to try civilians for murder committed in Kansas in July, 1918, if they are authorized to try soldiers for such a crime. How can respondent reconcile his conflicting contentions?

The legal definition of the phrases "time of peace" and "time of war" correspond with the ordinary meaning attached to those phrases. Bartol says, "Among arms, said the Roman author, laws are silent. Among arms, we may add the temples of prayer are voiceless." Burke says: "Laws are commanded to hold their tongues among arms, and tribunals fall to the ground with *the peace* they are no longer able to uphold."

It follows that in accordance with every definition it was a time of peace within the state and district of Kansas, not only on and after the 11th day of November, 1918, but on the 29th day of July, 1918, and that the court-martial was without jurisdiction.

VIII.

The order detailing the General Court-Martial (Rec. 3) shows that two members of the detail were retired from the army and therefore not eligible to sit as members thereof. It also shows that three members were designated as United States guards, but does not disclose whether those guards were prison guards or penitentiary guards or coast guards, or whether they were or were not in the military service of the United States or in the marine corps, and that therefore the tribunal was not constituted as required by the 4th Article of War.

The detail for the court contained in Secretary Baker's order of October 19, 1918, shows that the first two members of the detail were Major Samuel A. Smoke, U. S. Army, retired, and Captain Henry M. Fales, U. S. Army, retired.

The order promulgated by the War Department on the 9th day of February, 1920, discloses that the sentences of death and of life imprisonment imposed upon the appellants were approved by the President of the United States, and in the first sentence of the order appears the following:

> "Before a general court-martial convened at Fort Leavenworth, November 4, 1918, pur-

> suant to special order No. 247, War Department, October 22, 1918, of which *Major Samuel A. Smoke, U. S. Army, retired, was President.* Major Walter Smith, Coast Artillery Corps, was Judge Advocate, and First Lieutenant Lewis A. Humason was Assistant Judge Advocate, were arraigned and tried."

It thus appears that the officer of the court-martial by whom the record was signed, to-wit, the president, was not competent to sit on the court-martial for the reason that he was retired from the army and was not an officer in the army as required by the Fourth Article of War. The Fourth Article of War provides that:

> "All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on court-martial for the trial of any persons who may lawfully be brought before such courts for trial."

Subdivision A of Article One defines the word "officer" thus:

> "The word officer shall be construed to refer to a commissioned officer."

Major Smoke was an officer within the definition quoted, but it appears from the face of the proceedings that he was not an officer in the military service of the United States as required by the Fourth Article.

Under a decision of the United States Court for the District of Kansas as outlined in an opinion filed November 28, 1919, in the cause of *In re* David A. Henkes, *habeas corpus*, this question was considered and discussed. The court in that opinion referred to Clause 9, Section 2, Subdivision B, page 7 of the Manual for Courts-Martial, which provides as follows:

> "A retired officer may be assigned with his consent to active duty upon courts-martial in time of peace (Act of April 23, 1904, 33 Stat., 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat., 183) he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the Act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present. (See pars. 26 and 27.)

It does not appear from the face of the record that Major Samuel A. Smoke was with his consent assigned to active duty upon courts-martial in time of peace, nor does it appear that he was employed on active duty before being assigned as a member of the detail for the court which convicted the appellants. In passing upon the question here involved, the court there said:

> "If the record made at the trial does not on its face disclose the members of the court here at the time it was convened 'employed in active duty in the discretion of the President

> under Act of June 3, 1916,' it follows on the face of the record made the court was not composed as by law provided."

In that case the Government sought by evidence *aliunde* to show the fact that the members of the court, although retired officers, were at the time in the discretion of the President on active duty. Denying this contention the court said:

> "As it is a record of a court of special and limited jurisdiction it seems to be conclusively settled its jurisdiction must affirmatively appear on the face of the record and in the absence of such affirmative showing its judgment is a nullity."

In *Demming* v. *McClaughry*, 113 Fed. 639, Judge Sanborn for the Circuit Court of Appeals, states the rule applicable to courts-martial as follows:

> "A court-martial is a court of limited jurisdiction. It is a creature of the statute. A temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. The articles of war specify the officers who are in power to convene these courts, the officers who may compose them and the persons and charges which they are empowered to try. It necessarily follows that the jurisdiction of every court-martial, and hence the validity of each of its judgments, is conditioned by these indispensable prerequisites: (1) that it was convened by an officer empowered by the statutes to

> call it; (2) that the officers whom he commanded to sit upon it were of those whom he was authorized by the articles of war to detail for that purpose; (3) that the court thus constituted was invested by the acts of Congress with the power to try the person and the offense charged; and (4) that its sentence was in accordance with the Revised Statutes. The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial *coram non judice* and absolutely void because such a judgment and sentence is rendered without authority of law and without jurisdiction."

This same general rule was announced by the Supreme Court of the United States in *Runkle* v. *U. S.*, 122 U. S. 543, 546; *Gringen's Lessee* v. *Astor et. al.*, 2 How. 319; *Galpin* v. *Page*, Cyc. Vol. 11, Page 696.

IX.

The court-martial was not constituted as required by the 5th Article of War, for the reason that notwithstanding it was known of all men and is demonstrated by the records of the War Department that thirteen members could have been detailed without manifest injury to the service, yet only eight were detailed.

The Fifth Article of War is as follows:

> "General Courts-Martial may consist of any number of officers from five (5) to thirteen (13), inclusive, but they shall not consist of less than thirteen when that number can

be convened without manifest injury to the service."

The provision that a general court-martial shall not consist of less than thirteen (13) is a command by virtue of which the legislators sought to approximate the historical method of trial by jury, that is, twelve (12) jurors and a judge, believing that no man should be subject to trial for a felony except before a tribunal constituted at least with respect to numbers, as the ordinary tribunals in such cases were constituted. For this reason this section contains this express command coupled with the provision "when that number can be convened without manifest injury to the service." The question as to whether or not a greater number than eight (8) could have convened or been convened without inflicting a manifest injury to the military service is one which this court must determine. The form of recital in the order detailing or convening the court, that a greater number of officers cannot be assembled without manifest injury to the service, is necessarily contradicted by the physical facts shown in the records of the War Department of which this court can take judicial notice. There were in the months of October and November, 1918, more than two million soldiers in the army, completely officered. The city of Washington was swarming with army officers, and the judges of this court can recall that all the hotels and all the public buildings were filled with men wearing uniforms and shoulder straps.

These are also facts of which this court can take judicial notice for they are historical facts

which, in connection with the records of the War Department, absolutely contradict the recital made in an attempt to bring the order for the detail within the provisions of Article 5. But if the opinion in Williamson's case (1 Opinions, Atty. Genl. *296*, l. c. *297*) be worth anything, then the recital in the order detailing the court was not operative to deprive the appellants of their right to have a court-martial, which undertook to deprive them of their lives, of not less than thirteen (13).

In said opinion Attorney General Wirt said:

> "This being a case, however, of life and death, I beg leave to recall to your recollection, sir, that, by the 64th Article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened *without manifest injury to the service*. The court in the case of Williamson having consisted of five commissioned officers only, was not a legal court of *thirteen* could have been convened without manifest injury to the service. The phrase, you will observe is not "where that number (thirteen) can be *conveniently* convened," but where they *can* be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer, who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service*. And if a smaller number act, without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sen-

> tence would be murder. With all the respect, therefore, which we ought to feel for our officers, I suggest it to you, sir, as a matter of legal propriety, that, in *every case of life and death at least*, the President ought to be satisfied of the *manifest injury* which the service would have sustained in convening a court of *thirteen*, before he gives his sanction to a sentence of death from a smaller number."

He emphasizes the seriousness of taking away the lives of men by an improperly constituted tribunal, calling attention to the fact that the phrase is not "where that number (thirteen) can be conveniently convened," but "when they can be convened at all," not only without probable injury, but without manifest injury to the service.

Webster's New International Dictionary thus defines manifest:

> "Evident to the senses, especially to sight; apparent; distinctly perceived; hence, obvious to the understanding; evident to the mind; easily apprehensible; plain; not obscured or hidden. SNY:—Open, clear, apparent, visible, plain, unmistakable, indubitable, indisputable, evident, self-evident. *Manifest, obvious, patent, palpable* apply to that which is evident. That is *manifest* which is clearly evident as to arrest one's attention; that is patent which is open or unconcealed; that is *palpable* which is evident to (or as to) the senses."

It must appear to this court before it can hold that the tribunal was legally constituted, even if

discharge in a penitentiary. The Disciplinary Barracks is a penitentiary in fact, though not in name, where military convicts are kept with a view to reformation, but their "status" as members of the "land forces" or the "armies" is lost during the service of the sentence as discharged convicts. (Secs. 337 to 339, Manual of Courts-Martial, inclusive.)

Any person sentenced by court-martial may be sent to the Federal Penitentiary with civil convicts if the sentence be one year or more (Art. of War 42). As a matter of fact there are many military convicts in the Federal Penitentiary at Leavenworth, Kansas. Should one of those convicts in the Federal Penitentiary commit rape or murder in said penitentiary then, under the theory of respondent he could not be tried by a civil court but the warden would be under the necessity of writing to some army officer to appoint some of his subordinates to erect themselves into a court to try him for the murder. How could such convict be held to be in the land or naval forces? The absurdity of the contention is apparent. As convicts sentenced by courts-martial and those sentenced by the civil courts occupy the same status in fact, so they occupy the same status in legal contemplation. That is, neither class belongs to the "land forces" or the "armies of the United States."

The persons serving sentences adjudged by courts-martial contemplated by Clause "E" of the Second Article of War are those who *still remain in the military service* while so serving their sentences. It would, therefore, seem that the cases

of appellants are not "cases arising in the land or naval forces" and that as appellants were not members of the army of the United States on July 29th, 1918, they could not be tried by court-martial for a civil crime.

Section 8 of Article I of the Constitution grants power to Congress "to raise and support armies" and "to make rules for the government and regulation of the *land* * * * *forces.*" The Fifth Amendment requires that "no person shall be held to answer for a *capital* * * * crime unless on a presentment by a grand jury, except in cases arising *in* the *land* * * * *forces.*"

It was by virtue of this authority that Congress made the rules by which petitioners were dishonorably discharged from the army by sentence of courts-martial. After sentence and its publication their status was settled. If they were not then in the army Congress could make no rule for regulating their conduct as members of the land forces. The fact that the sentences of discharge could have been set aside did not affect their status. The fact remains that those sentences *were not annulled* at the time of the alleged murder or trial. The petitioners could not be dishonorably *discharged* prisoners who *had been soldiers in the army* and at the same time *be in the army* on July 29th, 1918. Secretary of War Baker ordered the publication and distribution of War Department Document No. 560. At least, so the title page recites. This document is entitled, "A Manual for Courts-Martial." Section 38, Clause "E," page 21 of said manual contains the construction placed by said Secretary and the chief

law officers of the army on the effect of a dishonorable discharge by sentence of a court-martial, to-wit:

> "A dishonorable discharge does not relate to any particular contract or term of enlistment; it is a discharge from the military service as a punishment—*a complete expulsion from the army*—and covers all unexpired enlistments. A soldier thus dishonorably discharged *can not* be made amenable for a desertion or other military offense committed under a prior enlistment except as provided in A. W. 94. Nor would a subsequent enlistment after such dishonorable discharge operate to revive the amenability of the soldier for such offenses."

The courts have thus construed the effect of a discharge (*U. S.* v. *Sweet*, 189 U. S. 471):

> "In the military service the word 'discharge' is the word applied to an order ending the service of an officer at his own request; but in other connections it conveys the notion of a movement beginning with a superior, and more or less adverse to the object, as for instance, we speak of the discharge of a servant. Usually it is a slightly discrediting verb."

In *Williams* v. *U. S.*, 137 U. S. 113, it was held that:

> "The term 'discharge' was used during the period of the Revolution to designate the dismissal from the continental service of troops, either individually or as organizations."

The words "all persons" in Clause "E" of the Second Article of War, where read in the light of the *subject matter* referred to in the enacting clause of the statute adopting the Articles of War, to-wit, for the government of the army and of the constitutional provision authorizing Congress to make rules for the regulation of the land forces necessarily means all persons *in* the army or land forces. Literally construed, those words would include a person who was never in the army or land forces but whom a court-martial arbitrarily and wrongfully sentenced. Endlich, in his work on Interpretation of Statutes, Secs. 86 and 90, says:

> (86) "—it is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject matter in reference to which the words are used, finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject matter. While expressing truly enough all that the legislature intended, they frequently express more, in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute, without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be construed as particular if the intention be particular; that is, they must be understood as used in reference to the subject matter in the mind of the legislature, and strictly limited to it."

(90) "—the word 'persons' may be variously understood as meaning persons born in the Queen's Allegiance, or as including also all foreigners actually within the British dominions (a) or (the meaning in prize and commercial law) only persons domiciled in those dominions. (b) In an Act which provided for the recovery of wages by 'persons belonging to a ship,' this expression would obviously be confined to persons employed in its service on board; while in one which related to the salvage of 'persons belonging to the ship, it would as obviously include passengers as well as crew. (c) And the word 'crew' in a statute prohibiting any master or other officer of a vessel maliciously to imprison, etc., any of the crew, was held to include, not only the common seamen, but the subordinate officers, e. g., the first mate of the ship."

Again, Sec. 1342 is a *penal* statute. The Articles of War included in it provide for the infliction of greater and more penalties than the penal code of the United States. For to all crimes of which the non-military citizen can be guilty are superadded those which soldiers only can commit. And in view of the fact that the personnel of the arbitrary tribunal authorized to inflict those penalties on the common soldier are men who are not his peers or learned in the law but men who are to him the aristocrats and autocrats of the earth and bear the same relation to him that the master bears to his slave and whose watchwords and hobby are "Discipline," "Obedience," rather than "Justice" or "Right" and that the procedure conforms to no rule but the arbi-

trary will of the individuals constituting the tribunal, the section in question may be truly described as comprising the most oppressive and sanguinary code that has appeared in the statute books of any civilized nation since the days of Draco. Incorporated in it are all the pains and penalties which can be inflicted by civilized man upon his fellows. Hence it is a statute to which the rule of strict construction should be applied in its utmost rigor. In a leading case expounding the rule, which is as old as construction itself, that penal statutes must be construed strictly, Chief Justice Marshall said (*U. S.* v. *Wiltberger*, 5 Wheat., l. c. 96):

> "The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedents forming a general rule for other cases."

Accordingly, it was held that an act of Congress punishing certain offenses committed on the

"high seas" could not be extended to an offense committed on the tidal waters of a navigable river of a foreign country.

The words "all persons under sentence adjudged by courts-martial" construed in the sense for which respondent contends would include not only persons *while serving sentences*, but also every person who had ever been sentenced by court-martial. This for the reason that a sentence of a court-martial carries with it the stigma and disabilities attached by law to conviction of a crime against the United States. In 19 Opp. Atty. Gen. 106, it is said:

> "The crimes and misdemeanors forbidden by the Articles of War are offenses against the United States."

In 11 Opp. Atty. Gen. 19, it is said:

> "While a judgment entered by the President approving the sentence of a court-martial dismissing an officer from the service is, after it has been executed, irrevocable, *he may remove the guilt of the dismissed officer by pardon.*"

It would, therefore, seem that every soldier who has been sentenced by court-martial remains *under* the sentence until its effect is removed by a pardon. He remains *under* it in the absence of such pardon during his life as completely as those soldiers who are now dead must until the end of time remain

> "*Under* the sod and the dew, waiting the judgment day."

Therefore, the word "under" cannot be held to be synonymous with the words "while serving." The true criterion by which to determine the meaning of Clause "E" is the Constitution. As the stream cannot rise higher than its source so the Congress can enact no valid law save that which the Constitution authorizes it to enact. Unless the petitioners were members of the land or naval forces on July 29, 1918, they were not subject to military law. The Secretary of War, in his Court-Martial Manual, describes a "general prisoner" as a "former soldier." Section 74, Clause "J," page 38 of the Court-Martial Manual, with note thereto attached, is as follows:

> "In charging a general prisoner with an offense, the form of the charge will not be changed but the specification will read as follows:
>
> 'In that General Prisoner A..... B.... did (here allege the offense in the language prescribed when it is committed by an officer or soldier.)'
>
> It is not necessary to allege in the specification that the general prisoner *was formerly a soldier,* was tried by a general court-martial, and sentenced to dishonorable discharge and a term of confinement and that he committed the offense while serving such confinement. The words 'general prisoner' *necessarily import such facts.*
>
> (Note.—*General prisoners* are persons sentenced to *dismissal* or *dishonorable discharge* and to terms of confinement at military posts or elsewhere.)"

The charge and the sentence by virtue of which appellants are confined by respondent, designates appellants as "general prisoners."

This in connection with the admission at page 21 of the manual that the effect of a dishonorable discharge, is a complete expulsion from the army would seem to be conclusive. A person so sentenced can not be required to render *military service*. In *Ex parte Henderson*, 11 Fed. Cas. No. 6349, it is said:,

> "As * * * the power of Congress is limited to making rules and regulations for the government of the land and naval forces and of the militia *in service*, it would seem to follow that these regulations cannot extend beyond what is *necessary* and *proper* for the governing, of these forces as such *and in their military character*."

Petitioners were divested of their military character according to the rules set forth in the Manual of Courts-Martial published under the direction of the Secretary, of War, when they lost the status of soldiers and became convicts. Congress had no power to subject such persons to trial by courts-martial. The cases cited by respondent upon, examination will be found not to support their contentions either upon reason or authority. The construction sought to be placed upon this penal statute by respondent would not square with those applied by the Supreme, Court. In *U. S.* v. *Locher*, 134 U. S. 624, it is said:

> "—before a man can be punished his case must be, plainly and unmistakably, within the statute."

In the construction of penal statutes "every case must come not only within its letter, but within its spirit and purpose" (*U. S.* v. *Celluloid*, 82 Fed. 634). "Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the michief intended to be remedied." (*Ferret* v. *Atwill*, 1 Blatchf. 156.) Article of War 74 does not aid respondent. That article merely provides that a person who is *undergoing sentence* for a crime or offense punishable under these articles shall not be turned over to the civil authorities by the commanding officer. A *rule* regulating the *duties of an officer* involves totally different principles from those applicable to a law vesting juridiction in a court. The word "undergoing" in the 74th Article means something different from the word "under" in Clause "EE" of the 2nd Article. A man might be "under" the surface of the earth but it is hard to understand how he could be "undergoing" the surface of the earth. So a prisoner "under" sentence is in a different situation from a prisoner "undergoing" sentence. To give effect to the contention of respondent this court must "presume" that Congress intended that word "under" should be synonymous with the words "while serving" or "while undergoing." That is to say, it must indulge in *presumptions* in favor of the jurisdiction of the court-martial. But the court in *Hamilton* v. *McClaughry*, 136 Fed. 445, holds that this cannot be done:

> "It is settled law that courts-martial are courts of inferior and limited jurisdiction. *No presumptions in favor of their exercise of*

> *jurisdiction are indulged.* To give effect to their judgments imposed it must be made to *clearly and affirmatively appear* that the court was legally constituted, that it *had jurisdiction* of the *person and offense* charged, and that its judgment is conformable to law. *Dynes* v. *Hoover*, 20 How. 625; *Runkle* v. *U. S.*, 122 U. S. 543. The judgments of such courts may be called in question in a collateral proceeding. *Ex Parte Watkins*, 3 Pet. 193; *Wise* v. *Withers*, 3 Cranch. 331. Again, so jealous are all English speaking nations of the liberty of their subjects, where a respondent in *habeas corpus* admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of *some provision of positive law* binding upon him, or the writ must issue or the person restrained have his liberty."

The provisions of positive law to which the respondents could point in the Craig and Wildman cases cited cannot be relied on here. There the jurisdiction was *expressly* given. Here it is not. But these cases were not decided by courts of last resort and the Craig decision rests on the Wildman opinion and neither case rests on facts like those admitted here. Judge Foster, in the Wildman case, had grave doubt of the propriety of his decision. He cited no authority and yet he would not decide whether or not Congress was exceeding its authority notwithstanding it appears from the opinion that he understood the question for decision to be whether or not Congress was justified in bringing "within the jurisdiction of the military courts several classes of persons hold-

ing certain relations to the army, *although not really in the military service.*" He concludes his opinion by saying:

> "The question is one of great importance, involving the validity of the act of Congress and the personal liberty of the individual, as also the discipline and management of the military prisons, and *I hope this decision may be brought before some higher tribunal for further consideration.*"

Judge Thayer's opinion in the Craig case (70 Fed. 960), rests on Judge Foster's in the Wildman case, and also on the decision in *Re Bogart*, 2 Sawy. 396. The latter case was not in point for the court expressly decided that Bogart was "an officer in the navy" at the time of commission of the offense. But it does not appear in those cases as it does here that the legal effect of a dishonorable discharge is a "complete expulsion" from the army. The Secretary of War, on page 21 of his Court-Martial Manual, expressly declares that the effect of the sentence was to completely throw petitioners out of the land forces. How he can with any grace contend here that he did not mean what he wrote or what was written by his order into the manual is more than we can comprehend. Had Judges Thayer and Foster such an express admission before them on the part of the respondents in those cases it is hardly probably that they would have held that such a discharge "cannot be held to have the effect of severing his connection with the army." Respondent herein cites the manual as binding authority of this Court. If it

mulgation of the sentence of the court-martial. From what has been hitherto submitted it appears that a dishonorable discharge imposes a dishonorable status and converts a soldier who becomes a general prisoner into a *former* soldier. It disables him from assisting his country to administer justice upon a public enemy or render any sort of military duty. In this respect the disability incident to a sentence of the variety in question is similar to the disability of incompetency which resulted at common law in preventing a convicted felon from assisting his country as a witness to administer justice in time of peace upon the person who violated its laws or who sought justice in its courts. This disqualification was an integral part of the sentence and became operative *immediately* upon the rendition of the sentence (*Huntington* v. *Attrill,* 126 U. S. 657; *Brown* v. *U. S.,* 233 Fed. 353; *Commonwealth* v. *Green,* 17 Mass., l. c. 547). There is an interesting discussion of this subject in the case of *State* v. *Grant,* 79 Mo. 113, where the court holds that the statute of Fifth Elizabeth imposing the disability of incompetency on a witness convicted of perjury was construed to be part of the punishment and sentence and that the same rule applied in this country with reference to disabilities imposed by statute. Said the court:

> "The conclusion may rationally be drawn that under the statutory provision now being discussed the disabilities which that statute annexes to the commission of a certain offense form, where conviction follows prosecution, part and parcel of the conviction. And if

such disabilities do not form, in contemplation of law, part of the judgment of conviction—part of the punishment annexed to the crime—then the record of the judgment of conviction would afford no evidence that the disabilities denounced by the statute had been incurred.

* * * * * * *

If the legislature can remit any portion of the sentence or judgment of a court of competent jurisdiction, then there is no obstacle to their remission of the whole sentence. The difference is only in degree and not in kind. I take it that when the statutes annex certain disabilities, the loss of certain civil rights, to the conviction of a crime, and a conviction of that crime thereafter occurs, that thereupon by force and operation of the law and of the judgment of conviction *the disabilities become welded to the crime, forming thereby an individual integer incapable of separation by any exertion of legislative power.*"

If the disability imposed by dishonorable discharge included in the sentence be an indivisible integer thereof, how can the execution be said to be postponed in view of the fact that the sentence is itself the only criterion by which to determine whether or not it has become operative? The respondents contend that a court-martial is a court which is supreme within its sphere, having competent jurisdiction with complete and adequate power to impose sentences for crime including in the sentence a dishonorable discharge. But they contend that after the sentence is promulgated and the soldier is degraded by being stripped of

his uniform and arrayed in the garb of a convict merely serving his sentence for crime against the United States that he is still a soldier *for the purpose of punishment but for no other purpose.* We still confess our inability to understand how "convicts" can be made amenable to a rule made for the government of "soldiers." Respondents claim that a power is vested somewhere to suspend the execution of a dishonorable discharge. This is a power which was never lawfully exercised by a common law court or by a court created by a law of Congress (*Ex parte United States,* 242 U. S. 27). If this be true it follows that the dishonorable discharge became fully effective when the sentence was promulgated and petitioners kicked out of the army and into a convict's cell and status.

Respondents rely upon the *obiter* remark of Chief Justice Fuller in *Carter* v. *McClaughry,* 183 U. S., l. c. 383, citing Section 1361, Rev. Stat., as supporting their contention that notwithstanding their admission that petitioners are discharged from the army and were so discharged their status as prisoners made them amenable to the Articles of War. It will be noted that the Chief Justice was answering the contention that Carter could not be tried after his discharge for an offense committed *before* his discharge and incidentally in supporting his declaration that the court-martial had jurisdiction he cited the *now repealed* Section 1361. From this it follows that respondents can find no comfort from this *obiter* remark based on a repealed statute. (Sec. 31 Opp. Atty. Gen.)

Congress has power to make rules which are necessary and proper only for the government of the soldiers in connection with their military duties and obligations. This is the construction placed upon the Articles of War in England and was the construction applied in the only opinion which we have found by a United States court in which the principles involved were discussed from their true standpoint. In *Ex Parte Henderson*, 11 Fed. Cas. No. 6349, it is said:

> "As * * * the power of Congress is limited to making rules and regulations for the government of the land and naval forces and of the militia in service, it would seem to follow that these regulations cannot extend beyond what is necessary and proper for the governing of these forces as such and in their military character. It is doubtful whether they can be subject to trial by court-martial for anything *but breaches of military duty*. Every soldier may be a citizen, and it would seem is as much entitled to trial by jury for any alleged crime, not committed by him in violation of his duty as a soldier, as any other person. It would be difficult to maintain that a law which subjected him to trial for such an offense committed in time of peace has ever been enacted in either England or America unless the act we are now considering be an exception. The Mutiny Act of England and our Articles of War are confined to the defining and providing for the punishment of *military offenses*. The purposes of these acts are so clearly and so accurately stated by Lord Loughborough in the case of *Grant* v. *Gould*, 2 H. Bl. 99, that I cannot forbear quoting from his opinion.

'The object of the Mutiny Act therefore is to create a court invested with authority to try those who are in the army, in all their different description of officers and soldiers, *and the object of the trial is limited to breaches of military duty.* Even by that extensive power granted by the legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army.' When war is actually raging it is said that a mutineer or deserter might unquestionably be tried by a military tribunal, according to the customary law of war (Pendergast, p. 3), and perhaps at that time other offenses committed by any one in the camp and in the field may be punished under the same law by the commander; but the common law of England knew nothing of courts-martial, and made no distinction in time of peace between a solider and any other subject. A soldier, therefore, by knocking down his colonel incurred only the ordinary penalties of assault and battery, and by refusing to obey orders, by sleeping on guard, or by deserting his colors incurred no penalty at all. (I Macaulay, History of England, p. 176; Pendergast, 15. The English people, with their omnipotent Parliament, have ever been exceedingly jealous of granting to courts-martial any jurisdiction over persons except those actually in their army or navy, and over them they have granted jurisdiction to punish only *military offenses—such jurisdiction only as seemed essential for their government as soldiers or sailors.*"

Mr. Justice Woodbury, in *Luther* v. *Borden et al.*, 7 How. 61, said:

> "And as a further proof how rigidly the civil power requires the military to confine even the modified court-martial to the military, and to what are strictly military matters, it cannot, without liability to a private suit in the judicial tribunals, be exercised *on a soldier himself for a cause not military*, or over which the officer had no right to order him; as, for example, to attend school instruction, or pay an assessment towards it out of his wages. (4 Taunt., 67; 4 Maul. & Sel., 400; 2 H. Bl., 103, 537; 3 Cranch, 337; 7 Johns. (N. Y.), 96).
>
> The prosecution of Governor Wall in England for causing, when he was in military command, a soldier to be seized and flogged so that he died, for an imputed offense not clearly military and by a pretended court-martial without a full trial, and executing Wall for the offense after a lapse of twenty years, illustrates how jealously the exercise of any martial power is watched in England, *though in the army itself and on its own members.* (See Annual Register for 1802, p. 569; 28 State Trials, p. 52, Howell's Ed.)."

XI.

The necessity of maintaining discipline in the army does not authorize Congress by virtue of its power to make rules for the Government of the land forces to enact laws providing that citizens may be deprived of their right to a trial by jury, even if the end sought to be accomplished by

such laws be legitimate. But no such assumed necessity exists.

Notwithstanding the foregoing demonstrates that petitioners are entitled to be tried by jury respondent seeks to justify the trial of petitioners by court martial on the ground of *necessity*. That is to say, that those rights to the mode of trial for crime which have hitherto been regarded as the inalienable rights of all citizens incorporated in the constitution can be withheld from a citizen who is conscripted merely because he is a conscript who must be disciplined. He says it is lawful to deprive a citizen of the right to a jury trial for the sole reason that he attained an age and physical perfection which in the opinion of Congress enabled him to render military service.

The War Department records show that during the war about 22,000 men were convicted by general courts-martial and about 375,000 by the other varieties of court-martial. It thus appears that in the short space of nineteen months 400,000 young men of the nation have been ground in this military mill and stamped with the stain of "criminal!" Violations of the articles of war have been held to be crimes against the United States (19 Opp. Atty. Gen. 106), the guilt or stain of which convictions can be removed only by the pardon of the President (11 Opp. Atty. Gen. 19). And even a pardon is not efficacious for we note that the Judge Advocate General says "a sentence of a court-martial once executed cannot be set aside by the President himself" (Off. U. S. Bull. March 5, 1919, p. 16). We understand that

about 4,000,000 men were enrolled in the army during the war period. The Selective Service Act did not commence to yield its returns until the fall of 1917, so that the court-martial was engaged in its work for little more than one year. If such dire results followed from the operations of this tribunal in one year, what would the result have been had American citizens been wrought upon by it from the commencement of the world war? In practically one year this tribunal has branded every tenth patriot called to the colors as a criminal. As to the variety of "branding" inflicted, we quote from testimony given before the Military Committee of the Senate on February 13, 1919, as quoted in the Literary Digest for March 1, 1919:

> "The sentences imposed for slight offenses by the courts-martial have shocked every sense of justice. They have reached the heights of injustice. The sentences in many instances bore no reasonable relationship to the offenses committed.
>
> For forty years the Army has been cursed with red tape in its court-martial proceedings. Terrible injustices have been inflicted upon small offenders. The whole system is wrong."

Public opinion as reflected in the press and of lawyers who were attached to the Judge Advocate General's Department during the war period, demonstrates that the system by which justice is sought to be administered in the army amounts to a violation of the constitutional prohibitions against deprivation of life or liberty without due

process of law and against the infliction of cruel and unusual punishments. The following is quoted from the Literary Digest for April 12, 1919:

"The Injustice of Army Justice.

When a half-witted youth is sentenced by a United States Army court-martial 'to ninety-nine years at hard labor for absence without leave, desertion, and escape,' the New York *Globe* is 'reminded of a Gilbert and Sullivan potentate, merrily assigning the day's work to his headsman.' When 'boyish pranks in the Army, incorrigibility under discipline, or in some instances conflict between duty to country and duty to hungry family at home, brought soldiers in uniform sentences ten times heavier than the courts were dealing out to the *Kultur* whelps who were traitors to America and friends of the enemy,' it seems to *The Globe* that Senator Chamberlain and Lieutenant-Colonel—formerly Brigadier-General—Ansell are more than justified in demanding court-martial reform. The Providence *Journal* is impressed by the 'growing mass of evidence' that the penalties inflicted by many of the 350,000 courts-martial held during our first year of war 'were unduly harsh, to say nothing of the contention that the rights of the defendants were often not properly safeguarded.' The Buffalo *Evening News* finds the Army law system 'archaic' and 'pitilessly cruel' in many cases. Observing that 'there is sometimes justice in a court-martial, but it is purely accidental,' the Washington *Post* calls the system 'hideous,' while the pro-Administration New York *World* characterizes it as 'lynch law for the Army.' Even though some of the stories of injustice

may be distorted or exaggerated, the Newark *News*, generally friendly to the Administration and the Secretary of War, finds it clear enough that the system 'is out of date and needs to be reformed.'

A group of lawyers who held commissions during the war and were assigned to the Judge-Advocate General's Department have joined in giving out a statement to the press asserting that—

'Our court-martial system has been inherited from English law as it existed prior to the American Revolution; it had its inception in medieval days when soldiers were not free citizens of the flag under which they served, but were either paid mercenaries or armed retainers of petty lords. Those were times when armies were made up of men who constituted the dregs of society, or were no more than the chattels of military commanders. England, France, and other democratic countries have changed and liberated their military codes so as to insure justice to their soldiers; but our armies are still governed by this brutal medieval court-martial system which has survived outside of the United States only in Germany and in Russia.'"

The chairman of the Senate Committee on Military Affairs, on March 10th, 1919, according to the Associated Press dispatches, described the sort of procedure to which four million young men of America have been subjected, thus:

"These sentences are imposed absolutely without any system in the administration of the criminal laws of the land, and they are really imposed at the order of the commanding officer, because if the court makes a rul-

> ing which is unpopular to the commanding officer he will order the court reconvened and, in some cases, issue instructions to it.
> * * *
>
> I have found boys of 17 and 18, not yet mature, sent away for long terms in prison, some of them because they were absent without leave—homesick youths who left to say goodby to their mothers or perhaps a last word with their sweethearts. Five days away led one of them to be sentenced for forty years."

The following statement appears in the Congressional Record for March 4, 1919, page 5269:

> "The United States, a nation which prides itself on the civil rights and freedom of its citizens, has a military code as archaic and despotic as that of Czar or Kaiser.
>
> In every other enlightened and free country, a soldier, no matter how low his rank, is tried by a military code which affords to him substantially the same protection as is given a civilian when tried by a civil court. In our army, however, a soldier is a creature without liberty or rights except those that the commanding officer may give him. This is a statement of an ugly fact, a fact which is sought to be successfully concealed under a mass of forms and ceremonies."

The Articles of War do not authorize common soldiers to serve as members of courts-martial. Articles 4 to 7 provide that no person "shall be competent to serve on courts-martial for the trial of any person" excepting officers in the military and marine corps services; these officers are ap-

pointed to serve by the commanding officer who has ordered the accused to be tried for crime. This method of constituting the tribunal deprives a common soldier of all semblance of a trial by his peers or equals who can understand or appreciate the intent or motive which prompted the act or omission for which he is being tried. Even Germany grants this right to its soldiers. No German soldier can be convicted of an offense by a court-martial unless his peers sit as members of the court which convicts him. In Vol. 6 New International Encyclopedia, page 189, it is said:

> "In the trials of enlisted men (in Germany) a certain proportion of the members of the court are of the rank of the accused."

The United States makes no provision for the aid or assistance to the court of men learned in military or other variety of law. It is assumed that the average man decorated with sword and spurs and a court-martial manual is as fully competent to try a man for his life as the most learned Judge of the Federal Court and to decide not only the *facts* but the *law also*. The Articles do not contemplate that lawyers shall sit on the court. This is also true of the prosecuting officer. Hence the tribunal is calculated to register the will of the commanding officer without regard to the laws of the country in matters involving the life and liberty of the citizen. Here again our laws do not favorably compare with those of Germany for there military lawyers are attached to each regiment to see that courts-martial administer criminal

United States have subjected the soldier to trial and conviction for all the crimes of which a civilian can be guilty and have also piled Pelion upon Ossa by enabling courts-martial to invent crimes and impose punishment without limit. The most baleful feature of the Articles of War is this power on the part of army officers to imagine or create crimes and to look to their discretion or conjecture alone for the measure of punishment. Articles 54 to 96, inclusive, are denominated Punitive Articles. A few of those forbid the imposition of the death sentence unless the offense be committed in time of war. Such are Articles 58 and 59. With the exception of the 82d and 92d Articles, which provide for death or life imprisonment, nearly all the others end with the phrase "shall suffer such punishment as a court-martial may direct." That is to say, the measure of punishment is the *discretion* of the court-martial, while the definition of the offense is also the *discretion* of the court-martial. The 96th Article contains a blanket provision which caps the climax in this regard:

> "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes of offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It has been held that a soldier can be punished under this last article for any disorders, conduct or offenses which in the *opinion* of the tribunal or accused officer amount to a disorder, misconduct or offense and then any conceivable punishment whatsoever, including death, save "flogging, branding, marking or tattooing on the body" (41) which the imagination of the court-martial suggests can be inflicted. Does it not follow that the military code duplicates Draco's? Of that bloody code it has been said: "For nearly all crimes was the same penalty of death. The man who was convicted of idleness, or who stole a cabbage or an apple was *liable* to death no less than the robber of temples or the murderer." (Plutarch, Life of Solon.) It is manifest that the author of the Articles of War looked to the bloody Grecian model rather than to the precepts of Jehovah (Deuteronomy, Chap. 25) or the page of Horace (1 Sat., iii, V. 77 and 119), or the lessons of Grotius (Chap. XX), for his inspiration when penning this merciless code. Does it not follow that the four million citizens who were swept into the army of the United States have been reduced to that condition which Blackstone describes as slavery? If it be "one of the genuine marks of servitude to have the law which is our rule of action either concealed or precarious" (4 Inst. 332 Bl. Bk. 1, 416), does it not follow that the American soldier is a slave from every viewpoint of that common law which has been the glory of England?

> "It is one of the glories of our English law that the species, though not always the

> quantity or degree of punishment is ascertained for every offense and that it is not left in the breast of any judge nor even a jury to alter that judgment which the law has beforehand ordained for every subject alike without respect of persons." (Bl. Bk. 4, p. 377.)

A British statesman once inveighed against the policy of trying American Colonists before British courts upon conjecture when he said:

> "* * * I would, sir, recommend to your serious consideration whether it be prudent to form a rule for punishing people, not on their own acts, but on your *conjectures?* Surely it is preposterous at the very best." (Burke on Conciliation.)

Respondent justifies the trial of petitioners for a civil crime within the geographical limits of the states of the Union at a time when the courts are open and when there was no war in this country but merely preparation for war on the ground of *necessity.* This is the age-old excuse which has ever been given by men in places of power for tyranny and oppression. They assert that this conduct on the part of army officers and on the part of Congress in authorizing them to do so is not only necessary but proper in these United States. We direct attention to the fact that that nation which has produced the world's greatest soldier, and which first introduced standing armies into Europe in the year 1445 (Bl. Com.. p. 1414). after all those centuries of experience with standing armies, finally abolished courts-martial.

> "In 1908 France took steps to abolish court-martial in time of peace, all common law

offenses to be judged by the ordinary courts and breaches of military discipline such as rebellion, insubordination, desertion and the like by mixed courts composed of civil and military magistrates." (Vol. 18, Ency. Britt. p. 449.)

In the year 1908 the French nation and French armies were standing in the shadow of the Prussian menace and were engaged in preparations for war on the same proportionate scale as the United States in July, 1918. The same condition existed in France up to the year 1914. In August of the latter year at the Marne the soldiers of France who were permitted to participate in the liberties which the non-military citizens of that republic enjoyed for the preceding six years performed an exploit which exceeded that of any mercenary army that had ever been benefited or oppressed in times of peace by the species of discipline visited upon men by courts-martial. That the oppressive method of discipline applied in the army of the United States is necessary in the sense contended for by respondent is merely an assertion upon the part of militarists who think that fear is the mainspring of human action. But according to that statesman who desired death if he could not have liberty, "fear is the passion of slaves." (Beveridge Life of Marshall Vol. 1, p. 398.) To justify the reduction of four millions of men to the condition described by the acting Judge Advocate General and referred to by Montesquieu and Blackstone at page 416, Book 1, as reducing soldiers to the same condition of slavery as the "eunuchs in the eastern seraglios," the necessity

must indeed be great. Their condition is more deplorable than that of the negro slaves of sixty years ago. No necessity warrants this oppression. It has not even the merit "that the end justifies the means." Even if it had that would not justify a departure from constitutional forms.

> "Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering, as this pretense of state necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy."
>
> * * * * * *
>
> (4 Wall. 75, 76.)
>
> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of *necessity* on which it is based is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."
>
> (4 Wall. 120.)

"Every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the Constitution of a country, and forms a prec-

edent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable."

(Hamilton Federalist No. 25.)

It thus appears that it was the idea of the framers of the Constitution and of the Supreme Court of the United States that necessity did not justify the abrogation of the Constitution. So that if we agree that courts-martial were necessary to accomplish the objects which respondents desire to accomplish, yet that necessity does not justify violations of the fundamental law. The assumption that the severity of the punishment authorized by the Articles of War is necessary is contradicted by the experience of other countries.

The following significant sentences show that it was *love of country* rather than *fear of punishment* that was responsible for those victories which are England's glory:

"Do you imagine, then, that * * * it is the annual vote in the Committee of Supply which gives you your army, or that it is the Mutiny Bill which inspires it with bravery and discipline? No! surely no! *It is the love of the people; it is their attachment to their government, from the sense of the deep stake they have in such a glorious institution, which gives you your army and your navy, and infuses into both that liberal obedience without which your army would be a base rabble, and your navy nothing but rotten timber.*"

(Burke on Conciliation.)

The validity of that claim is contradicted by the history of the English people from the time of King John to William III. It was only when the English nation really became a conquering nation that it was found necessary to enact the Mutiny Act. The immediate occasion of the enactment of that law, as shown by its preamble, was the projected invasion of France, and of a neighboring island to the west of England. The history of the Colonies and the history of this country show that the jurisdiction contended for was expressly denied by the law first enacted in 1775 by the Continental Congress, and which was in force in one form or another until the year 1916. *Caldwell* v. *Parker, supra*, is the first case in which the contention that a court-martial has jurisdiction in a capital case to try a soldier for a purely civil crime was advanced. If the country could successfully pilot its armies through a revolution, through the war of 1812, through the Mexican war, the Civil War, the Spanish War, and the Philippine and Boxer Rebellions without having said army subjected to the disciplinary power here contended for, it is reasonable to suppose that if experience be worth anything, or be capable of demonstrating any simple fact, that that experience has absolutely demonstrated that the extraordinary jurisdiction assumed in this case is not only not unnecessary, but is a violation of the first principles upon which the civilization of Anglo-Saxon communities is founded.

Conclusion.

The experience of England and France discloses that while a discipline enforced by courts-martial may be necessary for the *mercenary soldiers of a regular or standing army*, yet the efficiency of a *citizen soldiery* does not depend upon that variety of discipline.

During the years, when the nation from which we derive our language, laws and ideas of liberty was growing into strength, and safeguarding the constitutional rights of its citizens, no man, soldier or civilian, within the geographical limits of England could be tried on any charge of crime excepting by his peers. England's most glorious victories, both in domestic and foreign wars, were won by soldiers, who, while in England, were entitled to invoke the provisions of the Englishman's constitution or charter of liberties when charged with infractions of the law applicable to men in their civil or military capacities. It is true that when they left the limits of England, where war was flagrant, they were subject to the will of the commander or King (2 Wilson, Rep. 314), and the only restraint upon that arbitrary will was the salutary one incident to the comradeship engendered by encountering common dangers and enduring common hardships, in distant lands beyond the sea. Shakespeare, in his Henry V, puts the words:

> "We few, we happy few, we band of brothers;
> For he, today that sheds his blood with me,

Shall be my brother; be he ne'er so vile,
This day shall gentle his condition."
(King Henry V, Act IV, Scene III.)

into the mouth of the King at Agincourt, thus epitomizing this greatest of all restraints. Crecy, Poitiers, Agincourt, Towton Field, Marston Moor and Naseby were the fields on which England won her early glories and preserved her early hard won liberties. Not a soldier who fought on those bloody fields could within the geographical limits of England, when the courts were open, be tried by a court-martial. That is to say, discipline was maintained by the courts of the common law during the preparation period. In those courts they could be tried only by their peers. It was the iron discipline observed by the silent English bowmen when the German Knights and Genoese, with loud shouts, leaped forward to the encounter, that won the contest. (Green's Short Hist., 229.) Similar discipline was shown at Poitiers (Green's Short Hist., 230), and Agincourt, where eight thousand English soldiers defeated sixty thousand French and captured their King. (Green's Short Hist., 268.) In our day the soldiers of France prepared for war between the years 1908 and 1914 without the aid of a court-martial, and as a result of their discipline can point to the Marne, Verdun and other battle scenes as demonstrating their superiority in crucial contests over the court-martial disciplined soldiers of Germany. The soldiers of France who were permitted to invoke the laws of the Republic, guaranteeing liberty, equality and fraternity to its citizens within the limits of France in the same way as the ordinary

citizen could invoke those laws, are, shown by this recent experience to have been more efficient than men who were subjected to enslaving articles of war.

To hold that the Constitution extends the judicial power to all cases in law arising under the constitution and laws of the United States, and that the trial of all crimes except in cases of impeachment, shall be by jury and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and that no person shall be deprived of his life without due process of law, and that the Constitution was adopted to establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to all persons *within* the United States, and at the same time, to hold that one of the Governmental departments created by the Constitution can create a land force consisting of all the able-bodied men in the country and, by articles of war, enacted under the guise of rules for the government and regulation of that force, authorize them to commit, upon the civilian inhabitants and their fellow soldiers every crime to which the United States statutes attach a penal sanction, and then withdraw jurisdiction from the courts while they are open and able to try such soldier and apply such sanction is equivalent to holding that the Constitution imposes no restraint whatever upon the Congress with reference to the one particular source of power and danger against which the English-speaking peoples have always striven. If the contention that Congress can, within the geographical limits of the United

States when the courts are open, deprive the courts of jurisdiction to try and punish any men or set of men and vest such jurisdiction in courts-martial only be valid, then the contention that Congress could so legislate with reference to crimes committed by members of the land forces as to deprive courts-martial as well as the civil courts of jurisdiction to try and punish such men for civil crimes would be also valid.

We submit that such a contention is a contention that makes for the destruction of organized society, and if it be sustained, our Constitution is but a rope of sand, for the Constitution, instead of carrying its protection in its own bosom, carries the seeds of destruction therein, and if ever the doctrine becomes fully established that the legislative department of the Government has such plenary powers, then the liberty of the citizen is gone.

As it is the province of the courts to administer justice and to prevent the administration of injustice or the existence of a system by which injustice can be administered, we respectfully submit that it is the duty of this court in so far as it can do so on the facts now before it to give this system its death blow by holding that soldiers in the United States cannot be deprived of their lives or liberties except after a trial by juries of their peers. Should the courts fail in the performance of this plain duty then it is apparent that we have finally and forever bowed the knee to force. "Those who have once bowed the knee to force, must expect that force will be forever their master" (Hallman's Const. His. England I. Chap 10). "Let

us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves". (Ex-Justice Benjamin R. Curtis, Constitutional History of the United States, page 682).

Respectfully submitted,

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